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# Economic and Social Council

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## Letter dated 5 May 1999 from the Secretary-General of the United Nations to the President of the Economic and Social Council

I have the honour to refer to Economic and Social Council decision 1998/297, entitled "Request for an advisory opinion from the International Court of Justice". By that decision, the Council requested on a priority basis, pursuant to Article 96, paragraph 2, of the Charter of the United Nations, and in accordance with General Assembly resolution 89 (I), an advisory opinion from the International Court of Justice on the legal question of the applicability of Article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General (E/1998/94 and Add.1), and on the legal obligations of Malaysia in that case.

The International Court of Justice rendered the advisory opinion on 29 April 1999, a copy of which is contained in the annex. I have requested Mrs. Mary Robinson, the United Nations High Commissioner for Human Rights, to transmit a copy of the advisory opinion to the Chairman of the Commission on Human Rights.

(*Signed*) Kofi A. **Annan**

* E/1999/100

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# Annex

## International Court of Justice

YEAR 1999

**1999**
**29 April**
**General List**
**No. 100**

**29 April 1999**

## DIFFERENCE RELATING TO IMMUNITY FROM LEGAL PROCESS OF A SPECIAL RAPPORTEUR OF THE COMMISSION ON HUMAN RIGHTS

*Article 96, paragraph 2, of the Charter and Article 65, paragraph 1, of the Statute — Resolution 89 (I) of the General Assembly authorizing the Economic and Social Council to request advisory opinions — Article VIII, Section 30, of the Convention on the Privileges and Immunities of the United Nations — Existence of a "difference" between the United Nations and one of its Members — Opinion "accepted as decisive by the parties" — Advisory nature of the Court's function and particular treaty provisions — "Legal question" — Question arising "within the scope of [the] activity" of the body requesting it.*

*Jurisdiction and discretionary power of the Court to give an opinion — "Absence of compelling reasons" to decline to give such opinion.*

*Question on which the opinion is requested — Divergence of views — Formulation adopted by the Council as the requesting body.*

*Special Rapporteur of the Commission on Human Rights — "Expert on mission" — Applicability of Article VI, Section 22, of the General Convention — Specific circumstances of the case — Question whether words spoken by the Special Rapporteur during an interview were spoken "in the course of the performance of his mission" — Pivotal role of the Secretary-General in the process of determining whether, in the prevailing circumstances, an expert on mission is entitled to the immunity provided for in Section 22* (b) *— Interview given by Special Rapporteur to* International Commercial Litigation *— Contacts with the media by Special Rapporteurs of the Commission on Human Rights — Reference to Special Rapporteur's capacity in the text of the interview — Position of the Commission itself.*

*Legal obligations of Malaysia in this case — Point in time from which the question must be answered — Authority and responsibility of the Secretary-General to inform the government of a member State of his finding on the immunity of an agent — Finding creating a presumption which*

*can only be set aside by national courts for the most compelling reasons — Obligation on the governmental authorities to convey that finding to the national courts concerned — Immunity from legal process "of every kind" within the meaning of Section 22* (b) *of the Convention — Preliminary question which must be expeditiously decided* in limine litis.

*Holding the Special Rapporteur financially harmless.*

*Obligation of the Malaysian Government to communicate the advisory opinion to the national courts concerned.*

*Claims for any damages incurred as a result of acts of the Organization or its agents — Article VIII, Section 29, of the General Convention — Conduct expected of United Nations agents.*

## ADVISORY OPINION

Present: *President* SCHWEBEL; *Vice-President* WEERAMANTRY; *Judges* ODA, BEDJAOUI, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK; *Registrar* VALENCIA-OSPINA.

Concerning the difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights,

THE COURT,

composed as above,

*gives the following Advisory Opinion:*

1. The question on which the Court has been requested to give an advisory opinion is set forth in decision 1998/297 adopted by the United Nations Economic and Social Council (hereinafter called the "Council") on 5 August 1998. By a letter dated 7 August 1998, filed in the Registry on 10 August 1998, the Secretary-General of the United Nations officially communicated to the Registrar the Council's decision to submit the question to the Court for an advisory opinion. Decision 1998/297, certified copies of the English and French texts of which were enclosed with the letter, reads as follows:

"*The Economic and Social Council,*

*Having considered* the note by the Secretary-General on the privileges and immunities of the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers[1],

*Considering* that a difference has arisen between the United Nations and the Government of Malaysia, within the meaning of Section 30 of the Convention on the Privileges and Immunities of the United Nations, with respect to the immunity from legal process of Dato' Param Cumaraswamy, the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers,

*Recalling* General Assembly resolution 89 (I) of 11 December 1946,

1. *Requests* on a priority basis, pursuant to Article 96, paragraph 2, of the Charter of the United Nations and in accordance with General Assembly resolution 89 (I), an advisory opinion from the International Court of Justice on the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General[1], and on the legal obligations of Malaysia in this case;

2. *Calls upon* the Government of Malaysia to ensure that all judgements and proceedings in this matter in the Malaysian courts are stayed pending receipt of the advisory opinion of the International Court of Justice, which shall be accepted as decisive by the parties.

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[1]E/1998/94."

Also enclosed with the letter were certified copies of the English and French texts of the note by the Secretary-General dated 28 July 1998 and entitled "Privileges and Immunities of the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers" and of the addendum to that note (E/1998/94/Add. 1), dated 3 August 1998.

2. By letters dated 10 August 1998, the Registrar, pursuant to Article 66, paragraph 1, of the Statute of the Court, gave notice of the request for an advisory opinion to all States entitled to appear before the Court. A copy of the bilingual printed version of the request, prepared by the Registry, was subsequently sent to those States.

3. By an Order dated 10 August 1998, the senior judge, acting as President of the Court under Article 13, paragraph 3, of the Rules of Court, decided that the United Nations and the States which are parties to the Convention on the Privileges and Immunities of the United Nations adopted by the United Nations General Assembly on 13 February 1946 (hereinafter called the "General Convention") were likely to be able to furnish information on the question in accordance with Article 66, paragraph 2, of the Statute. By the same Order, the senior judge, considering that, in fixing time-limits for the proceedings, it was "necessary to bear in mind that the request for an

advisory opinion was expressly made 'on a priority basis'", fixed 7 October 1998 as the time-limit within which written statements on the question might be submitted to the Court, in accordance with Article 66, paragraph 2, of the Statute, and 6 November 1998 as the time-limit for written comments on written statements, in accordance with Article 66, paragraph 4, of the Statute.

On 10 August 1998, the Registrar sent to the United Nations and to the States parties to the General Convention the special and direct communication provided for in Article 66, paragraph 2, of the Statute.

4. By a letter dated 22 September 1998, the Legal Counsel of the United Nations communicated to the President of the Court a certified copy of the amended French version of the note by the Secretary-General which had been enclosed with the request. Consequently, a corrigendum to the printed French version of the request for an advisory opinion was communicated to all States entitled to appear before the Court.

5. The Secretary-General communicated to the Court, pursuant to Article 65, paragraph 2, of the Statute, a dossier of documents likely to throw light upon the question; these documents were received in the Registry in instalments from 5 October 1998 onwards.

6. Within the time-limit fixed by the Order of 10 August 1998, written statements were filed by the Secretary-General of the United Nations and by Costa Rica, Germany, Italy, Malaysia, Sweden, the United Kingdom and the United States of America; the filing of a written statement by Greece on 12 October 1998 was authorized. A related letter was also received from Luxembourg on 29 October 1998. Written comments on the statements were submitted, within the prescribed time-limit, by the Secretary-General of the United Nations and by Costa Rica, Malaysia, and the United States of America. Upon receipt of those statements and comments, the Registrar communicated them to all States having taken part in the written proceedings.

The Registrar also communicated to those States the text of the introductory note to the dossier of documents submitted by the Secretary-General. In addition, the President of the Court granted Malaysia's request for a copy of the whole dossier; on the instructions of the President, the Deputy-Registrar also communicated a copy of that dossier to the other States having taken part in the written proceedings, and the Secretary-General was so informed.

7. The Court decided to hold hearings, opening on 7 December 1998, at which oral statements might be submitted to the Court by the United Nations and the States parties to the General Convention.

8. Pursuant to Article 106 of the Rules of Court, the Court decided to make the written statements and comments submitted to the Court accessible to the public, with effect from the opening of the oral proceedings.

9. In the course of public sittings held on 7 and 8 December 1998, the Court heard oral statements in the following order by:

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|---|---|
| *for the United Nations:* | Mr. Hans Corell, Under-Secretary-General for Legal Affairs, The Legal Counsel, |
| | Mr. Ralph Zacklin, Assistant Secretary-General for Legal Affairs; |
| *for Costa Rica:* | H.E. Mr. José de J. Conejo, Ambassador of Costa Rica to the Netherlands, |
| | Mr. Charles N. Brower, White & Case LLP; |
| *for Italy:* | Mr. Umberto Leanza, Head of the Diplomatic Legal Service at the Ministry of Foreign Affairs; |
| *for Malaysia:* | Dato' Heliliah bt Mohd Yusof, Solicitor General of Malaysia, |
| | Sir Elihu Lauterpacht, C.B.E., Q.C., Honorary Professor of International Law, University of Cambridge. |

The Court having decided to authorize a second round of oral statements, the United Nations, Costa Rica and Malaysia availed themselves of this option; at a public hearing held on 10 December 1998, Mr. Hans Corell, H.E. Mr. José de J. Conejo, Mr. Charles N. Brower, Dato' Heliliah bt Mohd Yusof and Sir Elihu Lauterpacht were successively heard.

Members of the Court put questions to the Secretary-General's representative, who replied both orally and in writing. Copies of the written replies were communicated to all the States having taken part in the oral proceedings; Malaysia submitted written comments on these replies.

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* *

10. In its decision 1998/297, the Council asked the Court to take into account, for purposes of the advisory opinion requested, the "circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General" (E/1998/94). Those paragraphs read as follows:

"1. In its resolution 22A (1) of 13 February 1946, the General Assembly adopted, pursuant to Article 105 (3) of the Charter of the United Nations, the Convention on the Privileges and Immunities of the United Nations (the Convention). Since then, 137 Member States have become parties to the Convention, and its provisions have been incorporated by reference into many hundreds of agreements relating to the headquarters or seats of the United Nations and its organs, and to activities carried out by the Organization in nearly every country of the world.

2. That Convention is, *inter alia*, designed to protect various categories of persons, including 'Experts on Mission for the United Nations', from all types of interference by national authorities. In particular, Section 22 *(b)* of Article VI of the Convention provides:

> '*Section 22*: Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including time spent on journeys in connection with their missions. In particular they shall be accorded:
>
> . . . . . .
>
> *(b)* in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of any kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations.'

3. In its Advisory Opinion of 14 December 1989, on the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (the so-called '*Mazilu* case'), the International Court of Justice held that a Special Rapporteur of the Subcommission on the Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights was an 'expert on mission' within the meaning of Article VI of the Convention.

4. The Commission on Human Rights, by its resolution 1994/41 of 4 March 1994, endorsed by the Economic and Social Council in its decision 1994/251 of 22 July 1994, appointed Dato' Param Cumaraswamy, a Malaysian jurist, as the Commission's Special Rapporteur on the Independence of Judges and Lawyers. His mandate consists of tasks including, *inter alia*, to inquire into substantial allegations concerning, and to identify and record attacks on, the independence of the judiciary, lawyers and court officials. Mr. Cumaraswamy has submitted four reports to the Commission on the execution of his mandate: E/CN.4/1995/39, E/CN.4/1996/37, E/CN.4/1997/32 and E/CN.4/1998/39. After the third report containing a section on the litigation pending against him in the Malaysian civil courts, the Commission at its fifty-fourth session, in April 1997, renewed his mandate for an additional three years.

5. In November 1995 the Special Rapporteur gave an interview to *International Commercial Litigation*, a magazine published in the United Kingdom of Great Britain and Northern Ireland but circulated also in Malaysia, in which he commented on

certain litigations that had been carried out in Malaysian courts. As a result of an article published on the basis of that interview, two commercial companies in Malaysia asserted that the said article contained defamatory words that had 'brought them into public scandal, odium and contempt'. Each company filed a suit against him for damages amounting to M$30 million (approximately US$12 million each), 'including exemplary damages for slander'.

6. Acting on behalf of the Secretary-General, the Legal Counsel considered the circumstances of the interview and of the controverted passages of the article and determined that Dato' Param Cumaraswamy was interviewed in his official capacity as Special Rapporteur on the Independence of Judges and Lawyers, that the article clearly referred to his United Nations capacity and to the Special Rapporteur's United Nations global mandate to investigate allegations concerning the independence of the judiciary and that the quoted passages related to such allegations. On 15 January 1997, the Legal Counsel, in a note verbale addressed to the Permanent Representative of Malaysia to the United Nations, therefore 'requested the competent Malaysian authorities to promptly advise the Malaysian courts of the Special Rapporteur's immunity from legal process' with respect to that particular complaint. On 20 January 1997, the Special Rapporteur filed an application in the High Court of Kuala Lumpur (the trial court in which the said suit had been filed) to set aside and/or strike out the plaintiffs' writ, on the ground that the words that were the subject of the suits had been spoken by him in the course of performing his mission for the United Nations as Special Rapporteur on the Independence of Judges and Lawyers. The Secretary-General issued a note on 7 March 1997 confirming that 'the words which constitute the basis of plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his mission' and that the Secretary-General 'therefore maintains that Dato' Param Cumaraswamy is immune from legal process with respect thereto'. The Special Rapporteur filed this note in support of his above-mentioned application.

7. After a draft of a certificate that the Minister for Foreign Affairs proposed to file with the trial court had been discussed with representatives of the Office of Legal Affairs, who had indicated that the draft set out the immunities of the Special Rapporteur incompletely and inadequately, the Minister nevertheless on 12 March 1997 filed the certificate in the form originally proposed: in particular the final sentence of that certificate in effect invited the trial court to determine at its own discretion whether the immunity applied, by stating that this was the case '*only* in respect of words spoken or written and acts done by him in the course of the performance of his mission' (emphasis added). In spite of the representations that had been made by the Office of Legal Affairs, the certificate failed to refer in any way to the note that the Secretary-General had issued a few days earlier and that had in the meantime been filed with the court, nor did it indicate that in this respect, i.e. in deciding whether particular words or acts of an expert fell within the scope of his mission, the determination could exclusively be made by the Secretary-General, and that such determination had conclusive effect and therefore had to be accepted as such by the court. In spite of repeated requests by the Legal Counsel, the Minister for Foreign Affairs refused to amend his certificate or to supplement it in the manner urged by the United Nations.

8. On 28 June 1997, the competent judge of the Malaysian High Court for Kuala Lumpur concluded that she was 'unable to hold that the Defendant is absolutely protected by the immunity he claims', in part because she considered that the Secretary-General's note was merely 'an opinion' with scant probative value and no binding force upon the court and that the Minister for Foreign Affairs' certificate 'would appear to be no more than a bland statement as to a state of fact pertaining tothe Defendant's status and mandate as a Special Rapporteur and appears to have room for interpretation'. The Court ordered that the Special Rapporteur's motion be dismissed with costs, that costs be taxed and paid forthwith by him and that he file and serve his defence within 14 days. On 8 July, the Court of Appeal dismissed Mr. Cumaraswamy's motion for a stay of execution.

9. On 30 June and 7 July 1997, the Legal Counsel thereupon sent notes verbales to the Permanent Representative of Malaysia, and also held meetings with him and his Deputy. In the latter note, the Legal Counsel, *inter alia*, called on the Malaysian Government to intervene in the current proceedings so that the burden of any further defence, including any expenses and taxed costs resulting therefrom, be assumed by the Government; to hold Mr. Cumaraswamy harmless in respect of the expenses he had already incurred or that were being taxed to him in respect of the proceedings so far; and, so as to prevent the accumulation of additional expenses and costs and the further need to submit a defence until the matter of his immunity was definitively resolved between the United Nations and the Government, to support a motion to have the High Court proceedings stayed until such resolution. The Legal Counsel referred to the provisions for the settlement of differences arising out of the interpretation and application of the 1946 Convention that might arise between the Organization and a Member State, which are set out in Section 30 of the Convention, and indicated that if the Government decided that it cannot or does not wish to protect and to hold harmless the Special Rapporteur in the indicated manner, a difference within the meaning of those provisions might be considered to have arisen between the Organization and the Government of Malaysia.

10. Section 30 of the Convention provides as follows:

> '*Section 30:* All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.'

11. On 10 July yet another lawsuit was filed against the Special Rapporteur by one of the lawyers mentioned in the magazine article referred to in paragraph 5 above, based on precisely the same passages of the interview and claiming damages in an amount of MS60 million (US$24 million). On 11 July, the Secretary-General issued

a note corresponding to the one of 7 March 1997 (see para. 6 above) and also communicated a note verbale with essentially the same text to the Permanent Representative of Malaysia with the request that it be presented formally to the competent Malaysian court by the Government.

12. On 23 October and 21 November 1997, new plaintiffs filed a third and fourth lawsuit against the Special Rapporteur for M$100 million (US$40 million) and M$60 million (US$24 million) respectively. On 27 October and 22 November 1997, the Secretary-General issued identical certificates of the Special Rapporteur's immunity.

13. On 7 November 1997, the Secretary-General advised the Prime Minister of Malaysia that a difference might have arisen between the United Nations and the Government of Malaysia and about the possibility of resorting to the International Court of Justice pursuant to Section 30 of the Convention. Nonetheless on 19 February 1998, the Federal Court of Malaysia denied Mr. Cumaraswamy's application for leave to appeal stating that he is neither a sovereign nor a full-fledged diplomat but merely 'an unpaid, part-time provider of information'.

14. The Secretary-General then appointed a Special Envoy, Maître Yves Fortier of Canada, who, on 26 and 27 February 1998, undertook an official visit to Kuala Lumpur to reach an agreement with the Government of Malaysia on a joint submission to the International Court of Justice. Following that visit, on 13 March 1998 the Minister for Foreign Affairs of Malaysia informed the Secretary-General's Special Envoy of his Government's desire to reach an out-of-court settlement. In an effort to reach such a settlement, the Office of Legal Affairs proposed the terms of such a settlement on 23 March 1998 and a draft settlement agreement on 26 May 1998. Although the Government of Malaysia succeeded in staying proceedings in the four lawsuits until September 1998, no final settlement agreement was concluded. During this period, the Government of Malaysia insisted that, in order to negotiate a settlement, Maître Fortier must return to Kuala Lumpur. While Maître Fortier preferred to undertake the trip only once a preliminary agreement between the parties had been reached, nonetheless, based on the Prime Minister of Malaysia's request that Maître Fortier return as soon as possible, the Secretary-General requested his Special Envoy to do so.

15. Maître Fortier undertook a second official visit to Kuala Lumpur, from 25 to 28 July 1998, during which he concluded that the Government of Malaysia was not going to participate either in settling this matter or in preparing a joint submission to the current session of the Economic and Social Council. The Secretary-General's Special Envoy therefore advised that the matter should be referred to the Council to request an advisory opinion from the International Court of Justice. The United Nations had exhausted all efforts to reach either a negotiated settlement or a joint submission through the Council to the International Court of Justice. In this connection, the Government of Malaysia has acknowledged the Organization's right to refer the matter to the Council to request an advisory opinion in accordance with Section 30 of the Convention, advised the Secretary-General's Special Envoy that the United Nations should proceed to do so, and indicated that, while it will make its own presentations to the International Court of Justice, it does not oppose the submission of the matter to that Court through the Council."

11. The dossier of documents submitted to the Court by the Secretary-General (see paragraph 5 above) contains the following additional information that bears on an understanding of the request to the Court.

12. The article published in the November 1995 issue of *International Commercial Litigation*, which is referred to in paragraph 5 of the foregoing note by the Secretary-General, was written by David Samuels and entitled "Malaysian Justice on Trial". The article gave a critical appraisal of the Malaysian judicial system in relation to a number of court decisions. Various Malaysian lawyers were interviewed; as quoted in the article, they expressed their concern that, as a result of these decisions, foreign investors and manufacturers might lose the confidence they had always had in the integrity of the Malaysian judicial system.

13. It was in this context that Mr. Cumaraswamy, who was referred to in the article more than once in his capacity as the United Nations Special Rapporteur on the Independence of Judges and Lawyers, was asked to give his comments. With regard to a specific case (the *Ayer Molek* case), he said that it looked like "a very obvious, perhaps even glaring example of judge-choosing", although he stressed that he had not finished his investigation.

Mr. Cumaraswamy is also quoted as having said:

> "Complaints are rife that certain highly placed personalities in the business and corporate sectors are able to manipulate the Malaysian system of justice".

He added: "But I do not want any of the people involved to think I have made up my mind." He also said:

> "It would be unfair to name any names, but there is some concern about this among foreign businessmen based in Malaysia, particularly those who have litigation pending."

14. On 18 December 1995, two commercial firms and their legal counsel addressed letters to Mr. Cumaraswamy in which they maintained that they were defamed by Mr. Cumaraswamy's statements in the article, since it was clear, they claimed, that they were being accused of corruption in the *Ayer Molek* case. They informed Mr. Cumaraswamy that they had "no choice but to issue defamation proceedings against him" and added

> "It is important that all steps are taken for the purpose of mitigating the continuing damage being done to [our] business and commercial reputations which is worldwide, as quickly and effectively as possible."

15. On 28 December 1995, in view of the foregoing letters, the Secretariat of the United Nations issued a Note Verbale to the Permanent Mission of Malaysia in Geneva, requesting that the competent Malaysian authorities be advised, and that they in turn advise the Malaysian courts, of the Special Rapporteur's immunity from legal process. This was the first in a series of similar

communications, containing the same finding, sent by or on behalf of the Secretary-General — some of which were sent once court proceedings had been initiated (see paragraphs 6 *et seq.* of the note by the Secretary-General, reproduced in paragraph 10 above).

16. On 12 December 1996, the two commercial firms issued a writ of summons and statement of claim against Mr. Cumaraswamy in the High Court of Kuala Lumpur. They claimed damages, including exemplary damages, for slander and libel, and requested an injunction to restrain Mr. Cumaraswamy from further defaming the plaintiffs.

17. As stated in the note of the Secretary-General, quoted in paragraph 10 above, three further lawsuits flowing from Mr. Cumaraswamy's statements to *International Commercial Litigation* were brought against him.

The Government of Malaysia did not transmit to its courts the texts containing the Secretary-General's finding that Mr. Cumaraswamy was entitled to immunity from legal process.

The High Court of Kuala Lumpur did not pass upon Mr. Cumaraswamy's immunity *in limine litis*, but held that it had jurisdiction to hear the case before it on the merits, including making a determination of whether Mr. Cumaraswamy was entitled to any immunity. This decision was upheld by both the Court of Appeal and the Federal Court of Malaysia.

18. As indicated in paragraph 4 of the above note by the Secretary-General, the Special Rapporteur made regular reports to the Commission on Human Rights (hereinafter called the "Commission").

In his first report (E/CN.4/1995/39), dated 6 February 1995, Mr. Cumaraswamy did not refer to contacts with the media. In resolution 1995/36 of 3 March 1995, the Commission welcomed this report and took note of the methods of work described therein in paragraphs 63 to 93.

In his second report (E/CN.4/1996/37), dated 1 March 1996, the Special Rapporteur referred to the *Ayer Molek* case and to a critical press statement made by the Bar Council of Malaysia on 21 August 1995. The report also included the following quotation from a press statement issued by Mr. Cumaraswamy on 23 August 1995:

> "Complaints are rife that certain highly placed personalities in Malaysia including those in business and corporate sectors are manipulating the Malaysian system of justice and thereby undermining the due administration of independent and impartial justice by the courts.

> Under the mandate entrusted to me by the United Nations Commission on Human Rights, I am duty bound to investigate these complaints and report to the same Commission, if possible at its fifty-second session next year. To facilitate my inquiries I will seek the cooperation of all those involved in the administration of justice, including the Government which, under my mandate, is requested to extend its cooperation and assistance."

In resolution 1996/34 of 19 April 1996, the Commission took note of this report and of the Special Rapporteur's working methods.

In his third report (E/CN.4/1997/32), dated 18 February 1997, the Special Rapporteur informed the Commission of the article in *International Commercial Litigation* and the lawsuits that had been initiated against him, the author, the publisher, and others. He also referred to the notifications of the Legal Counsel of the United Nations to the Malaysian authorities. In resolution 1997/23 of 11 April 1997, the Commission took note of the report and the working methods of the Special Rapporteur, and extended his mandate for another three years.

In his fourth report (E/CN.4/1998/39), dated 12 February 1998, the Special Rapporteur reported on further developments with regard to the lawsuits initiated against him. In its resolution 1998/35 of 17 April 1998, the Commission similarly took note of this report and of the working methods reflected therein.

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19. As indicated above (see paragraph 1), the note by the Secretary-General was accompanied by an addendum (E/1998/94/Add.1) which reads as follows:

> "In paragraph 14 of the note by the Secretary-General on the privileges and immunities of the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers (E/1998/94), it is reported that the 'Government of Malaysia succeeded in staying proceedings in the four lawsuits until September 1998'. In this connection, the Secretary-General has been informed that on 1 August 1998, Dato' Param Cumaraswamy was served with a Notice of Taxation and Bill of Costs dated 28 July 1998 and signed by the Deputy Registrar of the Federal Court notifying him that the bill of costs of the Federal Court application would be assessed on 18 September 1998. The amount claimed is M$310,000 (US$77,500). On the same day, Dato' Param Cumaraswamy was also served with a Notice dated 29 July 1998 and signed by the Registrar of the Court of Appeal notifying him that the Plaintiff's bill of costs would be assessed on 4 September 1998. The amount claimed in that bill is M$550,000 (US$137,500)."

* *

20. The Council considered the note by the Secretary-General (E/1998/94) at the forty-seventh and forty-eighth meetings of its substantive session of 1998, held on 31 July 1998. At that time, the Observer for Malaysia disputed certain statements in paragraphs 7, 14 and 15 of the note. The note concluded with a paragraph 21 containing the Secretary-General's proposal for two questions to be submitted to the Court for an advisory opinion:

> "21 . . .
>
> 'Considering the difference that has arisen between the United Nations and the Government of Malaysia with respect to the immunity from legal process of Mr. Dato' Param Cumaraswamy, the United Nations Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers, in respect of certain words spoken by him:
>
> 1. Subject only to Section 30 of the Convention on the Privileges and Immunities of the United Nations, does the Secretary-General of the United Nations have the exclusive authority to determine whether words were spoken in the course of the performance of a mission for the United Nations within the meaning of Section 22 *(b)* of the Convention?
>
> 2. In accordance with Section 34 of the Convention, once the Secretary-General has determined that such words were spoken in the course of the performance of a mission and has decided to maintain, or not to waive, the immunity from legal process, does the Government of a Member State party to the Convention have an obligation to give effect to that immunity in its national courts and, if failing to do so, to assume responsibility for, and any costs, expenses and damages arising from, any legal proceedings brought in respect of such words?
>
> . . . . . ."

On 5 August 1998, at its forty-ninth meeting, the Council considered and adopted without a vote a draft decision submitted by its Vice-President following informal consultations. After referring to Section 30 of the General Convention, the decision requested the Court to give an advisory opinion on the question formulated therein, and called upon the Government of Malaysia to ensure that

> "all judgements and proceedings in this matter in the Malaysian courts are stayed pending receipt of the advisory opinion of the . . . Court . . . , which shall be accepted as decisive by the parties" (E/1998/L.49/ Rev. 1).

At that meeting, the Observer for Malaysia reiterated his previous criticism of paragraphs 7, 14 and 15 of the Secretary-General's note, but made no comment on the terms of the question to be put to the Court as now formulated by the Council. On being so adopted, the draft became decision 1998/297 (see paragraph 1 above).

* *

21. As regards events subsequent to the submission of the request for an advisory opinion, and more precisely, the situation with regard to the proceedings pending before the Malaysian courts, Malaysia has provided the Court with the following information:

> "the hearings on the question of stay in respect of three of the four cases have been deferred until 9 February 1999 when they are due again to be mentioned in court, and when the plaintiff will join in requesting further postponements until this Court's advisory opinion has been rendered, and sufficient time has been given to all concerned to consider its implications.
>
> The position in the first of the four cases is the same, although it is fixed for mention on 16 December [1998]. However, it will then be treated in the same way as the other cases. As to cost, the requirement for the payment of costs by the defendant has also been stayed, and that aspect of the case will be deferred and considered in the same way."

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22. The Council has requested the present advisory opinion pursuant to Article 96, paragraph 2, of the Charter of the United Nations. This paragraph provides that organs of the United Nations, other than the General Assembly or the Security Council,

> "which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities".

Article 65, paragraph 1, of the Statute of the Court states that

> "[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request".

23. In its decision 1998/297, the Council recalls that General Assembly resolution 89 (I) gave it authorization to request advisory opinions, and it expressly makes reference to the fact

> "that a difference has arisen between the United Nations and the Government of Malaysia, within the meaning of Section 30 of the Convention on the Privileges and Immunities of the United Nations, with respect to the immunity from legal process of Dato' Param Cumaraswamy, the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers".

24. This is the first time that the Court has received a request for an advisory opinion that refers to Article VIII, Section 30, of the General Convention, which provides that

> "all differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties."

25. This section provides for the exercise of the Court's advisory function in the event of a difference between the United Nations and one of its Members. In this case, such a difference exists, but that fact does not change the advisory nature of the Court's function, which is governed by the terms of the Charter and of the Statute. As the Court stated in its Advisory Opinion of 12 July 1973,

> "[t]he existence, in the background, of a dispute the parties to which may be affected as a consequence of the Court's opinion, does not change the advisory nature of the Court's task, which is to answer the questions put to it . . ." (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 171, para. 14 ).

Paragraph 2 of the Council's decision requesting the advisory opinion repeats *expressis verbis* the provision in Article VIII, Section 30, of the General Convention that the Court's opinion "shall be accepted as decisive by the parties". However, this equally cannot affect the nature of the function carried out by the Court when giving its advisory opinion. As the Court said in its Advisory Opinion of 23 October 1956, in a case involving similar language in Article XII of the Statute of the Administrative Tribunal of the International Labour Organisation, such "decisive" or "binding" effect

> "goes beyond the scope attributed by the Charter and by the Statute of the Court to an Advisory Opinion . . . It in no wise affects the way in which the Court functions; that continues to be determined by its Statute and its Rules. Nor does it affect the reasoning by which the Court forms its Opinion or the content of the Opinion itself." (*Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956*, p. 84.)

A distinction should thus be drawn between the advisory nature of the Court's task and the particular effects that parties to an existing dispute may wish to attribute, in their mutual relations, to an advisory opinion of the Court, which, "as such, . . . has no binding force" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71). These particular effects, extraneous to the Charter and the Statute which regulate the functioning of the Court, are derived from separate agreements; in the present case Article VIII, Section 30, of the General Convention provides that "[t]he opinion given by the Court shall be accepted as decisive by the parties". That consequence has been expressly acknowledged by the United Nations and by Malaysia.

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26. The power of the Court to give an advisory opinion is derived from Article 96, paragraph 2, of the Charter and from Article 65 of the Statute (see paragraph 22 above). Both provisions require that the question forming the subject-matter of the request should be a "legal question". This condition is satisfied in the present case, as all participants in the proceedings have acknowledged, because the advisory opinion requested relates to the interpretation of the General Convention, and to its application to the circumstances of the case of the Special Rapporteur, Dato' Param Cumaraswamy. Thus the Court held in its Advisory Opinion of 28 May 1948 that "[t]o determine the meaning of a treaty provision . . . is a problem of interpretation and consequently a legal question" (*Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, p. 61).

27. Article 96, paragraph 2, of the Charter also requires that the legal questions forming the subject-matter of advisory opinions requested by authorized organs of the United Nations and specialized agencies shall arise "within the scope of their activities". The fulfilment of this condition has not been questioned by any of the participants in the present proceedings. The Court finds that the legal questions submitted by the Council in its request concern the activities of the Commission, since they relate to the mandate of its Special Rapporteur appointed

> "to inquire into substantial allegations concerning, and to identify and record attacks on, the independence of the judiciary, lawyers and court officials".

Mr. Cumaraswamy's activities as Rapporteur and the legal questions arising therefrom are pertinent to the functioning of the Commission; accordingly they come within the scope of activities of the Council, since the Commission is one of its subsidiary organs. The same conclusion was reached by the Court in an analogous case, in its Advisory Opinion of 15 December 1989, also given at the request of the Council, regarding the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (*I.C.J. Reports 1989*, p. 187, para. 28).

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28. As the Court held in its Advisory Opinion of 30 March 1950, the permissive character of Article 65 of the Statute "gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 72). Such discretionary power does not exist when the Court is not competent to answer the question forming the subject-matter of the request, for example because it is not a "legal question". In such a case, "the Court has no discretion in the matter; it must decline to give the opinion requested" (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155; cf., *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, I.C.J. Reports 1996 (I)*, p. 73, para. 14). However, the Court went on to state, in its Advisory Opinion of 20 July 1962, that "even if the question is a legal one, which the Court is undoubtedly competent to answer, it may nonetheless decline to do so" (*I.C.J. Reports 1962*, p. 155).

29. In its Advisory Opinion of 30 March 1950, the Court made it clear that, as an organ of the United Nations, its answer to a request for an advisory opinion "represents its participation in the activities of the Organization, and, in principle, should not be refused" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71); moreover, in its Advisory Opinion of 20 July 1962, citing its Advisory Opinion of 23 October 1956, the Court stressed that "only 'compelling reasons' should lead it to refuse to give a requested advisory opinion" (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155). (See also, for example, *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, pp. 190-191, para. 37; and *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 235, para. 14).

30. In the present case, the Court, having established its jurisdiction, finds no compelling reasons not to give the advisory opinion requested by the Council. Moreover, no participant in these proceedings questioned the need for the Court to exercise its advisory function in this case.

* *

31. Article 65, paragraph 2, of the Statute provides that

> "[q]uestions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required".

In compliance with this requirement, the Secretary-General transmitted to the Court the text of the Council's decision, paragraph 1 of which reads as follows:

> "1. *Requests* on a priority basis, pursuant to Article 96, paragraph 2, of the Charter of the United Nations and in accordance with General Assembly resolution 89 (I), an advisory opinion from the International Court of Justice on the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General, and on the legal obligations of Malaysia in this case."

32. Malaysia has asserted to the Court that it had "at no time approved the text of the question that appeared in E/1998/L.49 or as eventually adopted by ECOSOC and submitted to the Court" and that it "never did more than 'take note' of the question as originally formulated by the Secretary-General and submitted to the ECOSOC in document E/1998/94". It contends that the advisory opinion of the Court should be restricted to the existing difference between the United Nations and Malaysia. In Malaysia's view, this difference relates to the question (as formulated by

the Secretary-General himself (see paragraph 20 above)) of whether the latter has the exclusive authority to determine whether acts of an expert (including words spoken or written) were performed in the course of his or her mission. Thus, in the conclusion to the revised version of its written statement, Malaysia states, *inter alia*, that it

> "considers that the Secretary-General of the United Nations has not been vested with the exclusive authority to determine whether words were spoken in the course of the performance of a mission for the United Nations within the meaning of Section 22 *(b)* of the Convention".

In its oral pleadings, Malaysia maintained that

> "in implementing Section 30, ECOSOC is merely a vehicle for placing a difference between the Secretary General and Malaysia before the Court. ECOSOC does not have an independent position to assert as it might have had were it seeking an opinion on some legal question other than in the context of the operation of Article 30. ECOSOC . . . is no more than an instrument of reference, it cannot change the nature of the difference or alter the content of the question."

33. In the written statement presented on behalf of the Secretary-General, the Legal Counsel of the United Nations requested the Court

> "to establish that, subject to Article VIII, Sections 29 and 30 of the Convention, the Secretary-General has exclusive authority to determine whether or not words or acts are spoken, written or done in the course of the performance of a mission for the United Nations and whether such words or acts fall within the scope of the mandate entrusted to a United Nations expert on mission".

In this submission, it has also been argued

> "that such matters cannot be determined by, or adjudicated in, the national courts of the Member States parties to the Convention. The latter position is coupled with the Secretary-General's right and duty, in accordance with the terms of Article VI, Section 23, of the Convention, to waive the immunity where, in his opinion, it would impede the course of justice and it can be waived without prejudice to the interests of the United Nations."

34. The other States participating in the present proceedings have expressed varying views on the foregoing issue of the exclusive authority of the Secretary-General.

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35. As the Council indicated in the preamble to its decision 1998/297, that decision was adopted by the Council on the basis of the note submitted by the Secretary General on "Privileges and Immunities of the Special Rapporteur of the Commission on Human Rights on the

Independence of Judges and Lawyers" (see paragraph 1 above). Paragraph 1 of the operative part of the decision refers expressly to paragraphs 1 to 15 of that note but not to paragraph 21, containing the two questions that the Secretary-General proposed submitting to the Court (see paragraph 20 above). The Court would point out that the wording of the question submitted by the Council is quite different from that proposed by the Secretary-General.

36. Participants in these proceedings have advanced differing views as to what is the legal question to be answered by the Court. The Court observes that it is for the Council — and not for a member State nor for the Secretary-General — to formulate the terms of a question that the Council wishes to ask.

37. The Council adopted its decision 1998/297 without a vote. The Council did not pass upon any proposal that the question to be submitted to the Court should include, still less be confined to, the issue of the exclusive authority of the Secretary-General to determine whether or not acts (including words spoken or written) were performed in the course of a mission for the United Nations and whether such words or acts fall within the scope of the mandate entrusted to an expert on mission for the United Nations. Although the Summary Records of the Council do not expressly address the matter, it is clear that the Council, as the organ entitled to put the request to the Court, did not adopt the questions set forth at the conclusion of the note by the Secretary-General, but instead formulated its own question in terms which were not contested at that time (see paragraph 20 above). Accordingly, the Court will now answer the question as formulated by the Council.

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38. The Court will initially examine the first part of the question laid before the Court by the Council, which is:

> "the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General . . ."

39. From the deliberations which took place in the Council on the content of the request for an advisory opinion, it is clear that the reference in the request to the note of the Secretary-General was made in order to provide the Court with the basic facts to which to refer in making its decision. The request of the Council therefore does not only pertain to the threshold question whether Mr. Cumaraswamy was and is an expert on mission in the sense of Article VI, Section 22, of the General Convention but, in the event of an affirmative answer to this question, to the consequences of that finding in the circumstances of the case.



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40. Pursuant to Article 105 of the Charter of the United Nations:

> "1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.
>
> 2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.
>
> 3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose."

Acting in accordance with Article 105 of the Charter, the General Assembly approved the General Convention on 13 February 1946 and proposed it for accession by each Member of the United Nations. Malaysia became a party to the General Convention, without reservation, on 28 October 1957.

41. The General Convention contains an Article VI entitled "Experts on Missions for the United Nations". It is comprised of two Sections (22 and 23). Section 22 provides:

> "Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including time spent on journeys in connection with their missions. In particular they shall be accorded:
>
> . . . . . .
>
> *(b)* in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations.
>
> . . . . . ."

42. In its Advisory Opinion of 14 December 1989 on the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, the Court examined the applicability of Section 22 *ratione personae*, *ratione temporis* and *ratione loci*.

In this context the Court stated:

> "The purpose of Section 22 is . . . evident, namely, to enable the United Nations to entrust missions to persons who do not have the status of an official of the Organization, and to guarantee them 'such privileges and immunities as are necessary for the independent exercise of their functions'. . . . The essence of the matter lies not in their administrative position but in the nature of their mission." (*I.C.J. Reports 1989*, p. 194, para. 47.)

In that same Advisory Opinion, the Court concluded that a Special Rapporteur who is appointed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities and is entrusted with a research mission must be regarded as an expert on mission within the meaning of Article VI, Section 22, of the General Convention (*ibid.*, p. 197, para. 55).

43. The same conclusion must be drawn with regard to Special Rapporteurs appointed by the Human Rights Commission, of which the Sub-Commission is a subsidiary organ. It may be observed that Special Rapporteurs of the Commission usually are entrusted not only with a research mission but also with the task of monitoring human rights violations and reporting on them. But what is decisive is that they have been entrusted with a mission by the United Nations and are therefore entitled to the privileges and immunities provided for in Article VI, Section 22, that safeguard the independent exercise of their functions.

44. By a letter of 21 April 1994, the Chairman of the Commission informed the Assistant Secretary-General for Human Rights of Mr. Cumaraswamy's appointment as Special Rapporteur. The mandate of the Special Rapporteur is contained in resolution 1994/41 of the Commission entitled "Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers". This resolution was endorsed by the Council in its decision 1994/251 of 22 July 1994. The Special Rapporteur's mandate consists of the following tasks:

"*(a)* to inquire into any substantial allegations transmitted to him or her and report his or her conclusions thereon;

*(b)* to identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations, including accommodations for the provision of advisory services or technical assistance when they are requested by the State concerned;

*(c)* to study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers."

45. The Commission extended by resolution 1997/23 of 11 April 1997 [Dossier No. 7] the Special Rapporteur's mandate for a further period of three years.

In the light of these circumstances, the Court finds that Mr. Cumaraswamy must be regarded as an expert on mission within the meaning of Article VI, Section 22, as from 21 April 1994, that by virtue of this capacity the provisions of this Section were applicable to him at the time of his statements at issue, and that they continue to be applicable.

46. The Court observes that Malaysia has acknowledged that Mr. Cumaraswamy, as Special Rapporteur of the Commission, is an expert on mission and that such experts enjoy the privileges and immunities provided for under the General Convention in their relations with States parties,

including those of which they are nationals or on the territory of which they reside. Malaysia and the United Nations are in full agreement on these points, as are the other States participating in the proceedings.

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47. The Court will now consider whether the immunity provided for in Section 22 *(b)* applies to Mr. Cumaraswamy in the specific circumstances of the case; namely, whether the words used by him in the interview, as published in the article in *International Commercial Litigation* (November issue 1995), were spoken in the course of the performance of his mission, and whether he was therefore immune from legal process with respect to these words.

48. During the oral proceedings, the Solicitor General of Malaysia contended that the issue put by the Council before the Court does not include this question. She stated that the correct interpretation of the words used by the Council in its request

> "does not extend to inviting the Court to decide whether, assuming the Secretary-General to have had the authority to determine the character of the Special Rapporteur's action, he had properly exercised that authority"

and added:

> "Malaysia observes that the word used was *'applicability'* not *'application'*. 'Applicability' means 'whether the provision is applicable to someone' not 'how it is to be applied'."

49. The Court does not share this interpretation. It follows from the terms of the request that the Council wishes to be informed of the Court's opinion as to whether Section 22 *(b)* is applicable to the Special Rapporteur, in the circumstances set out in paragraphs 1 to 15 of the note of the Secretary-General and whether, therefore, the Secretary-General's finding that the Special Rapporteur acted in the course of the performance of his mission is correct.

50. In the process of determining whether a particular expert on mission is entitled, in the prevailing circumstances, to the immunity provided for in Section 22 *(b)*, the Secretary-General of the United Nations has a pivotal role to play. The Secretary-General, as the chief administrative officer of the Organization, has the authority and the responsibility to exercise the necessary protection where required. This authority has been recognized by the Court when it stated:

> "Upon examination of the character of the functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter." (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 184.)

51. Article VI, Section 23, of the General Convention provides that "[p]rivileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves." In exercising protection of United Nations experts, the Secretary-General is therefore protecting the mission with which the expert is entrusted. In that respect, the Secretary-General has the primary responsibility and authority to protect the interests of the Organization and its agents, including experts on mission. As the Court held:

> "In order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization, and that he may count on it. To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization . . ." (*Ibid.*, p. 183.)

52. The determination whether an agent of the Organization has acted in the course of the performance of his mission depends upon the facts of a particular case. In the present case, the Secretary-General, or the Legal Counsel of the United Nations on his behalf, has on numerous occasions informed the Government of Malaysia of his finding that Mr. Cumaraswamy had spoken the words quoted in the article in *International Commercial Litigation* in his capacity as Special Rapporteur of the Commission and that he consequently was entitled to immunity from "every kind" of legal process.

53. As is clear from the written and oral pleadings of the United Nations, the Secretary-General was reinforced in this view by the fact that it has become standard practice of Special Rapporteurs of the Commission to have contact with the media. This practice was confirmed by the High Commissioner for Human Rights who, in a letter dated 2 October 1998, included in the dossier, wrote that: "it is more common than not for Special Rapporteurs to speak to the press about matters pertaining to their investigations, thereby keeping the general public informed of their work".

54. As noted above (see paragraph 13), Mr. Cumaraswamy was explicitly referred to several times in the article "Malaysian Justice on Trial" in *International Commercial Litigation* in his capacity as United Nations Special Rapporteur on the Independence of Judges and Lawyers. In his reports to the Commission (see paragraph 18 above), Mr. Cumaraswamy had set out his methods of work, expressed concern about the independence of the Malaysian judiciary, and referred to the civil lawsuits initiated against him. His third report noted that the Legal Counsel of the United Nations had informed the Government of Malaysia that he had spoken in the performance of his mission and was therefore entitled to immunity from legal process.

55. As noted in paragraph 18 above, in its various resolutions the Commission, took note of the Special Rapporteur's reports and of his methods of work. In 1997, it extended his mandate for another three years (see paragraphs 18 and 45 above). The Commission presumably would not have so acted if it had been of the opinion that Mr. Cumaraswamy had gone beyond his mandate and had given the interview to *International Commercial Litigation* outside the course of his functions. Thus the Secretary-General was able to find support for his findings in the Commission's position.

56. The Court is not called upon in the present case to pass upon the aptness of the terms used by the Special Rapporteur or his assessment of the situation. In any event, and in view of all the circumstances of this case, elements of which are set out in paragraphs 1 to 15 of the note by the Secretary-General, the Court is of the opinion that the Secretary-General correctly found that Mr. Cumaraswamy, in speaking the words quoted in the article in *International Commercial Litigation*, was acting in the course of the performance of his mission as Special Rapporteur of the Commission. Consequently, Article VI, Section 22 *(b)*, of the General Convention is applicable to him in the present case and affords Mr. Cumaraswamy immunity from legal process of every kind.

* *

57. The Court will now deal with the second part of the Council's question, namely, "the legal obligations of Malaysia in this case".

58. Malaysia maintains that it is premature to deal with the question of its obligations. It is of the view that the obligation to ensure that the requirements of Section 22 of the Convention are met is an obligation of result and not of means to be employed in achieving that result. It further states that Malaysia has complied with its obligation under Section 34 of the General Convention, which provides that a party to the Convention must be "in a position under its own law to give effect to [its] terms", by enacting the necessary legislation; finally it contends that the Malaysian courts have not yet reached a final decision as to Mr. Cumaraswamy's entitlement to immunity from legal process.

59. The Court wishes to point out that the request for an advisory opinion refers to "the legal obligations of Malaysia in this case". The difference which has arisen between the United Nations and Malaysia originated in the Government of Malaysia not having informed the competent Malaysian judicial authorities of the Secretary-General's finding that Mr. Cumaraswamy had spoken the words at issue in the course of the performance of his mission and was, therefore, entitled to immunity from legal process (see paragraph 17 above). It is as from the time of this omission that the question before the Court must be answered.

60. As the Court has observed, the Secretary-General, as the chief administrative officer of the Organization, has the primary responsibility to safeguard the interests of the Organization; to that end, it is up to him to assess whether its agents acted within the scope of their functions and, where he so concludes, to protect these agents, including experts on mission, by asserting their immunity. This means that the Secretary-General has the authority and responsibility to inform the government of a member State of his finding and, where appropriate, to request it to act accordingly and, in particular, to request it to bring his finding to the knowledge of the local courts if acts of an agent have given or may give rise to court proceedings.

61. When national courts are seised of a case in which the immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General concerning that immunity. That finding, and its documentary expression, creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts.

The governmental authorities of a party to the General Convention are therefore under an obligation to convey such information to the national courts concerned, since a proper application of the Convention by them is dependent on such information..

Failure to comply with this obligation, among others, could give rise to the institution of proceedings under Article VIII, Section 30, of the General Convention.

62. The Court concludes that the Government of Malaysia had an obligation, under Article 105 of the Charter and under the General Convention, to inform its courts of the position taken by the Secretary-General. According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule, which is of a customary character, is reflected in Article 6 of the Draft Articles on State Responsibility adopted provisionally by the International Law Commission on first reading, which provides:

> "The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinated position in the organization of the State." (*Yearbook of the International Law Commission*, 1973, Vol. II, p. 193.)

Because the Government did not transmit the Secretary-General's finding to the competent courts, and the Minister for Foreign Affairs did not refer to it in his own certificate, Malaysia did not comply with the above-mentioned obligation.

63. Section 22 *(b)* of the General Convention explicitly states that experts on mission shall be accorded immunity from legal process of every kind in respect of words spoken or written and acts done by them in the course of the performance of their mission. By necessary implication, questions of immunity are therefore preliminary issues which must be expeditiously decided *in limine litis*. This is a generally-recognized principle of procedural law, and Malaysia was under an obligation to respect it. The Malaysian courts did not rule *in limine litis* on the immunity of the Special Rapporteur (see paragraph 17 above), thereby nullifying the essence of the immunity rule contained in Section 22 *(b)*. Moreover, costs were taxed to Mr. Cumaraswamy while the question of immunity was still unresolved. As indicated above, the conduct of an organ of a State — even an organ independent of the executive power — must be regarded as an act of that State. Consequently, Malaysia did not act in accordance with its obligations under international law.

64. In addition, the immunity from legal process to which the Court finds Mr. Cumaraswamy entitled entails holding Mr. Cumaraswamy financially harmless for any costs imposed upon him by the Malaysian courts, in particular taxed costs.

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65. According to Article VIII, Section 30, of the General Convention, the opinion given by the Court shall be accepted as decisive by the parties to the dispute. Malaysia has acknowledged its obligations under Section 30.

Since the Court holds that Mr. Cumaraswamy is an expert on mission who under Section 22 *(b)* is entitled to immunity from legal process, the Government of Malaysia is obligated to communicate this advisory opinion to the competent Malaysian courts, in order that Malaysia's international obligations be given effect and Mr. Cumaraswamy's immunity be respected.

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66. Finally, the Court wishes to point out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity.

The United Nations may be required to bear responsibility for the damage arising from such acts. However, as is clear from Article VIII, Section 29, of the General Convention, any such claims against the United Nations shall not be dealt with by national courts but shall be settled in accordance with the appropriate modes of settlement that "[t]he United Nations shall make provisions for" pursuant to Section 29.

Furthermore, it need hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations.

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67. For these reasons,

THE COURT

*Is of the opinion*:

(1) *(a)* By fourteen votes to one,

That Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations is applicable in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

AGAINST: *Judge* Koroma;

*(b)* By fourteen votes to one,

That Dato' Param Cumaraswamy is entitled to immunity from legal process of every kind for the words spoken by him during an interview as published in an article in the November 1995 issue of *International Commercial Litigation*;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

AGAINST: *Judge* Koroma;

(2) *(a)* By thirteen votes to two,

That the Government of Malaysia had the obligation to inform the Malaysian courts of the finding of the Secretary-General that Dato' Param Cumaraswamy was entitled to immunity from legal process;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

AGAINST: *Judges* Oda, Koroma;

*(b)* By fourteen votes to one,

That the Malaysian courts had the obligation to deal with the question of immunity from legal process as a preliminary issue to be expeditiously decided *in limine litis*;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

AGAINST: *Judge* Koroma;

(3) Unanimously,

That Dato' Param Cumaraswamy shall be held financially harmless for any costs imposed upon him by the Malaysian courts, in particular taxed costs.

(4) By thirteen votes to two,

That the Government of Malaysia has the obligation to communicate this advisory opinion to the Malaysian courts, in order that Malaysia's international obligations be given effect and Dato' Param Cumaraswamy's immunity be respected;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

AGAINST: *Judges* Oda, Koroma.

Done in English and French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-ninth day of April, one thousand nine hundred and ninety-nine, in two copies, of which one will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

*(Signed)* Stephen M. SCHWEBEL,
President.

*(Signed)* Eduardo VALENCIA-OSPINA,
Registrar.

Vice-President WEERAMANTRY, Judges ODA, and REZEK append separate opinions to the Advisory Opinion of the Court.

Judge KOROMA appends a dissenting opinion to the Advisory Opinion of the Court.

*(Initialled)* S.M.S.

*(Initialled)* E.V.O.

## SEPARATE OPINION OF VICE-PRESIDENT WEERAMANTRY

*Importance of protection of United Nations personnel — Immunities of United Nations functionaries distinguished from those of State representatives — Conclusiveness of Secretary-General's determination — Need for uniform international jurisprudence on this matter — Duty of rapporteurs to ensure that they act within the terms of their mandate*

I agree with the conclusions of the Court as set out in the Court's Opinion. I would wish also to stress my agreement, in particular, with the principles set out in paragraph 61 of the Opinion that when national courts are seised of a case in which the immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General concerning that immunity, that the Secretary-General's finding, and its documentary expression, create a presumption of immunity which can only be set aside for the most compelling reasons, and that they are thus to be given the greatest weight by national courts.

I would wish, however, to add a few observations stemming from the issues involved in this Opinion.

### Importance of protection of United Nations personnel

It is manifest that the protection of its personnel, when engaged about their duties, is of prime importance to the proper functioning of the United Nations system.

Rapporteurs must be able to perform their duties without fear or favour as their investigations often cover sensitive ground in the country whose instrumentalities are the subjects of their inquiry. They cannot discharge their responsibilities with the independence essential to free and complete inquiry if they need to keep looking over their shoulder for adverse personal consequences that may ensue from an independent investigation. Should this be the case, there would be an impairment both of the efficiency of the rapporteur and of the integrity of the entire machinery of independent inquiry which is so vital to the working of the United Nations.

This is important also in the interests of the ability of the United Nations to recruit to its service the best talent that might be available. It scarcely advances the interests of the Organization if individuals most suitable for a particular assignment should keep away from such assignments through fear that they may in some way be victimized when engaged in their duties. As this Court observed in the *Reparations* case: "In order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization, and that he may count on it."[1]

Apart from such basic considerations and the conventional principles relating to this matter, numerous resolutions of the General Assembly have stressed the necessity for protection of United Nations personnel against such impediments in the way of the performance of their duties.

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[1] *Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949,*

Such protection is especially important when United Nations personnel are investigating matters concerning the host State or its governmental institutions. Just as it is the special duty of the host State to take every step within its power to avoid situations interfering with the freedom of inquiry of functionaries of the United Nations, so also is it the special duty of the United Nations to do all within its power to ensure for them the enjoyment of such freedom. Moreover, the responsibilities that apply to foreign States apply even more strongly to States which, as in the present case, are the home States of United Nations personnel engaged on their international duties in their home State itself.

**Conceptual antecedents of the system of United Nations immunities**

In working out a system of immunity for United Nations officials who are engaged upon their official duties, the international legal system has drawn upon its past experience of the international system of immunity which had evolved in regard to diplomats, consuls, members of armed services, and others, who are physically within the territory of another State, while performing functions for their home State. The relevant provision for the United Nations is to be found in Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, 1946.

All claims to immunity in customary international law raised two important questions relevant to the matters now before the Court — determining whether the act in question was performed in the course of the official's mission, and determining questions relating to the jurisdiction of domestic courts of the host country.

The case-law regarding diplomatic immunity contains a strong current of decisions indicating that the domestic courts of the host State have strongly and successfully asserted their authority to determine these questions.

For a representative selection of decisions on this topic, it will suffice to refer to the 1928 case of Bigelow, the Director of the Passport Section of the United States Consulate in Paris[2] decided by the French courts; the 1955 case of the American serviceman Cheney[3] decided in the Japanese courts; the 1982 case of the Director of the Portuguese Commercial Office in Brussels[4] decided by the Belgian courts; and the 1988 case of the Counsellor of the German Embassy in Chile[5] decided by the Chilean courts. These are sufficient to indicate that domestic courts have in general claimed the exclusive right to determine, in cases of qualified immunity, whether the act in question was performed within the ambit of the official functions of the functionary concerned.

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[2] *Princess Zizianoff* v. *Kahn and Bigelow*, (1927-28) 4 *ILR (Annual Digest)*, p. 384.

[3] *Japan* v. *Cheney*, (1960) 23 *ILR* 264.

[4] *Portugal* v. *Goncalves*, (1990) 82 *ILR* 115.

[5] *Szurgelies and Szurgelies* v. *Spohn*, (1992) 89 *ILR* 44.

**United Nations functionaries distinguished from State representatives**

Some important distinguishing features must, however, be noted between the immunities of State officials and those of the functionaries of the United Nations.

The duties of the latter are not restricted to the service of any particular State, but are owed to the community of States as represented by the United Nations. The limits of their functions are not determined by any particular State, but are defined on behalf of the international community by the Secretary-General of the United Nations. Their protections are claimed, not on behalf of any particular State, but on behalf of the international community whom such functionaries serve. A dispute arising out of their activities is not justiciable within the limited perspectives of the States involved, but engages the global interests of the United Nations. As "the supreme type of international organization"[6], the functions and interests of the United Nations are on a different plane from those of any individual nation State.

These essential differences lift the matter into a different frame of reference and cannot pass unnoticed as international law moves towards a universally applicable system of administrative jurisprudence covering the conduct and protections of United Nations personnel wherever in the world their missions may take them.

It follows that the jurisprudence that has grown up around the exclusive rights of the domestic courts of the host State to determine these questions is not necessarily applicable in its totality where United Nations personnel are involved. There may well need to be some differences of approach which, while paying due regard to the autonomy of domestic courts, also take into account the wider interests of the world community, and the competence and special responsibilities of the United Nations as representing that community. As this Court has observed concerning the United Nations:

> "It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.[7]"

United Nations activity in a number of sensitive areas is fraught with a diversity of problems if a domestic court is free to disregard the determination of the Secretary-General, the chief administrative authority of the United Nations, in relation to the immunity enjoyed by a United Nations functionary.

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[6] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 179.

[7] *Ibid.*

Locally sensitive issues could crowd out perspectives regarding the global norms applicable to such situations. Divergent and incompatible domestic decisions in different countries could blur the general principles applicable. The authority of considered opinions reached at the highest possible level of United Nations administration regarding the functions of its own personnel could be weakened. The effectiveness of the United Nations in discharging its far-flung responsibilities could be impaired.

All these are important concerns raised by the matter under consideration by the Court.

**The need for uniformity in the jurisprudence relating to this matter**

If domestic courts can make their rulings without regard to the opinion of the Secretary-General, the lack of uniformity among these rulings, and the different principles and standards thereby applied in different countries would impede both the fairness of international administration and the evolution of a uniform system of international administrative law.

While domestic autonomy is a principle which must be accorded the greatest respect, it must be acknowledged that the United Nations system, as an organization functioning in the global interest, can only use its authority effectively in that global interest if its agents can discharge their duties according to a common set of principles, and not if the régime governing their actions varies from country to country depending on the disparate ways in which various domestic judiciaries may choose to determine the self-same issue.

The expanding scope and growing complexity of United Nations activities render the evolution of a uniform administrative jurisprudence in this area a matter of vital importance. That jurisprudence, while not neglectful of the varying nuances of different local conditions and backgrounds, would at the same time exhibit an ordered harmony of general principles and standards commanding international recognition.

Acceptance of the binding nature of the Secretary-General's opinion, unless there is manifest reason to depart therefrom, helps considerably towards establishing such uniformity, irrespective of the venue of the investigation.

The evolution of a common set of principles applicable to matters of this sort would, by producing a more uniform system of international administrative law, in turn reinforce the authority of these principles in specific situations wherever they may occur. It would also avoid the incongruous situation of different rapporteurs — or indeed the same rapporteur — enjoying different degrees of immunity in different countries, depending on where the relevant duties are performed. This possibility is well illustrated by the case of the present Rapporteur, whose duties require him to function in a diversity of jurisdictions. Such a result is to be avoided as far as is possible within the limits of the principles applicable.

In so sensitive a field as human rights, the freedom and independence of rapporteurs would be gravely affected if there should be varying standards and hence a resulting uncertainty regarding the principles applicable to this matter.

**Conclusiveness of Secretary-General's determination**

Since it is essential to United Nations staff that they receive sufficient protection to be able to discharge their missions with independence, and since the duty of protecting its staff in the exercise of such duties lies so heavily on the United Nations, great importance must attach to the views of its chief functionary, the Secretary-General, regarding the question whether immunity does or does not attach in a given case.

The Secretary-General is better informed than any external authority regarding such questions as the limits of a given agent's functions, the purpose or purposes the appointment was intended to serve, and the needs of the United Nations in relation to any particular inquiry. He is better informed than any other authority of the practice relating to, and the factual background surrounding, the particular matter. With his unique overview of the entire scheme of United Nations operations, he, more than any other authority, can assess a given agent's functions within the overall context of the rationale, traditions and operational framework of United Nations activities as a whole.

Any attempt to determine the applicability of the privileges and immunities of the United Nations to a particular rapporteur in particular circumstances without reference to the opinion of the Secretary-General would fail to take into account an important part of the material essential to an informed decision.

Moreover, within the United Nations system, there is a practice of recognition of the conclusiveness of the Secretary-General's authority in this regard, and there are General Assembly resolutions, such as resolution 36/238 of 18 December 1981, which indicate the special importance accorded to the view of the Secretary-General on the entire range of matters relating to administration within the Organization. The views of the United Nations' highest administrative authority on an essentially administrative matter such as the extent of a particular official's sphere of authority — a question so eminently within his knowledge and supervisory functions — cannot be disregarded without detriment to the entire system.

The Secretary-General's determination as to whether a particular action was within an official's or rapporteur's sphere of authority should therefore be viewed as binding on the domestic tribunal, unless compelling reasons can be established for displacing that weighty presumption. I am in complete and respectful agreement with the Court in this regard. There is no element of arbitrariness here, for if a State disputes such a ruling by the Secretary-General, there is always room for the matter to be brought before this Court for an advisory opinion in terms of Section 30 of the Convention.

**Correlative obligations of rapporteurs**

In the present case, the Human Rights Commission has noted with appreciation the work of the Special Rapporteur, as shown in resolutions 1995/36 of 3 March 1995, 1996/34 of 9 April 1996, 1997/23 of 11 April 1997, and 1998/35 of 17 April 1998[8]. It has also extended the Special Rapporteur's mandate for an additional period of three years by resolution 1997/23[9], after the statement in question. The Secretary-General has determined that the Special Rapporteur's statements were made while acting in the course of the performance of his mission as Special Rapporteur of the Commission. The Court has specifically endorsed the correctness of the Secretary-General's determination (para. 56). For the purposes of this reference, matters are thus definitively settled.

Yet this reference affords an opportunity to stress the essentiality of the duty of rapporteurs, and indeed of all United Nations functionaries, to ensure always that they act within the terms and the limits of their mandate.

As the Court has observed:

> "it need hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations"[10].

A basic premiss underlying the Court's Opinion, as well as this separate opinion, is that there is a duty of protection lying upon the United Nations to ensure that its officials are preserved harmless for acts performed in the course of their duty. It follows that any right a United Nations official enjoys by virtue of this principle is matched by a correlative duty.

It is thus an important corollary to the propositions set out earlier in this opinion that, complementary to the United Nations' duty of protection of its functionaries, a corresponding duty and responsibility lie on all United Nations personnel to ensure that whatever actions they take or statements they make are always within the limits of the performance of their duties — thus translating into this specific sphere of international law the principle of correlativity so well recognized in analytical jurisprudence. Unless this precondition is satisfied, United Nations

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[8]Dossier Nos. 5-8.

[9]Dossier No. 7.

[10]Para. 66.

personnel would be travelling outside the area of protection accorded to them. In this way, they protect both themselves and the United Nations, which owes a duty of protection to them. This obligation applies especially in regard to public statements which their duties may oblige them to make from time to time regarding their work.

**Conclusion**

For all these reasons, I am in agreement with the Court in its conclusions regarding the question referred to it.

*(Signed)* Christopher Gregory WEERAMANTRY.

# SEPARATE OPINION OF JUDGE SHIGERU ODA

## TABLE OF CONTENTS


| | | *Paragraphs* |
|---|---|---|
| 1. | Introduction | 1 - 2 |
| 2. | Modification of the questions to be put to the Court | 3 - 6 |
| 3. | Irrelevancy of the Secretary-General's "exclusive authority" | 7 - 10 |
| 4. | Mr. Cumaraswamy's legal immunity — difference between the United Nations and Malaysia on the interpretation and application of the Convention | 11 - 17 |
| 5. | Exemption from taxed costs | 18 - 19 |
| 6. | Decision on immunity by the Malaysian courts *in limine litis* | 20 - 22 |
| 7. | Legal obligation of Malaysia | 23 - 26 |


* *

## 1. Introduction

1. I voted in favour of paragraphs (1) *(a)*, (1) *(b)*, (2) *(b)* and (3) of the operative part of the Court's Advisory Opinion, which mainly relate to the application of the 1946 Convention on the Privileges and Immunities of the United Nations (hereinafter called "the Convention") in the case of Mr. Cumaraswamy, Special Rapporteur of the United Nations Commission on Human Rights on the independence of judges and lawyers. However, I voted against paragraph (2) *(a)* and paragraph (4) of the operative part, which involve the legal obligations of Malaysia in this case.

2. Before explaining the reasons behind my voting position on each of the paragraphs of the operative part, I would like to present my general views on the Court's Advisory Opinion as a whole. I am of the view that the Court has not necessarily given an adequate response to the questions set out in decision 1998/297 by the Economic and Social Council (hereinafter called "ECOSOC"), even though the Court's intention in paragraphs (1) *(a)*, (1) *(b)* and (3) of the operative part appears to be to respond to the *first question* put forward by ECOSOC, while the intention of paragraphs (2) *(a)*, (2) *(b)* and (4) of the operative part is to respond to the *second question* put forward by ECOSOC.

2. **Modification of the questions to be put to the Court**

3. First of all, I must point out the peculiarities of the present case. As correctly stated in paragraphs 20, 35 and 37 of the Advisory Opinion, the original text of the questions to be put before the Court prepared by the United Nations Secretary-General for ECOSOC was different from the text of the questions which were in fact spelled out in ECOSOC's decision 1998/297 dated 5 August 1998.

4. The text which the Secretary-General originally prepared in his note of 28 July 1998 on the "Privileges and Immunities of the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers" was drafted in order to find out whether:

> "the Secretary-General ha[s] the exclusive authority to determine whether words were spoken [by Mr. Cumaraswamy] in the course of the performance of a mission for the United Nations within the meaning of Section 22 *(b)* of [the Convention]" (E/1998/94, para. 21).

The form of the questions was changed in a somewhat abrupt manner when, following informal consultations, the draft decision was formulated by the Vice-President of ECOSOC on 5 August 1998 (E/1998/L.49/Rev. 1) and was adopted by ECOSOC on the same day, as decision 1998/297. The questions to be put to the Court in ECOSOC's draft decision thus formulated (as quoted in para. 6 below) differed significantly from what the Secretary-General had originally suggested one week before on 28 July 1998, as quoted above.

5. The circumstances in which the change to the draft occurred are not known outside of ECOSOC itself, as the Court explains in paragraph 37 of the Court's Advisory Opinion:

> "Although the Summary Records of [ECOSOC] do not expressly address the matter, it is clear that [ECOSOC], as the organ entitled to put the request to the Court, did not adopt the questions set forth at the conclusion of the note by the Secretary-General, but instead formulated its own question in terms which were not contested at that time."

The Court now has to respond to the questions presented in that final form by ECOSOC, as it correctly goes on to state in that same paragraph: "the Court will now answer the question as formulated by [ECOSOC]".

6. Whatever the reasons were behind the change in the questions, it is the task of the Court to respond to the questions which were actually put forward by ECOSOC, the *first* of which concerned:

> "the legal question of the applicability of Article VI, Section 22, of the [Convention] in the case of [Mr.] Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General".

It appears to me, as already stated in paragraph 2 of this opinion, that the Court responds to this question in paragraphs (1) *(a)* and (1) *(b)* of the operative part of the Advisory Opinion; paragraph (3) also appears to be the Court's response to the first question, of which an explanation is given in Section 5 of this opinion (see para. 18 below).

3. **Irrelevancy of the Secretary-General's "exclusive authority"**

7. The Court is now requested, under Article VIII, Section 30, of the Convention, to give an advisory opinion on "[a] legal question involved" in "a difference . . . between the United Nations on the one hand and [Malaysia] on the other hand" as spelled out in the *first question* in ECOSOC's decision.

8. The authority of the Secretary-General is in fact not directly at issue, even though the arguments of both the Parties to the difference, namely the United Nations and Malaysia, in the written and oral pleadings, as well as the arguments of those States which participated in the proceedings, were largely concentrated on that very issue. While the Advisory Opinion discussed the arguments of the Parties on this matter (cf. paras. 32, 33 and 34), the Court's conclusions in paragraphs (1) *(a)* and (1) *(b)* of the operative part of the Advisory Opinion were not in fact founded on the United Nations Secretary-General's allegedly authoritative determination with regard to the applicability of the Convention in the case of Mr. Cumaraswamy or to Mr. Cumaraswamy's entitlement to immunity from Malaysian legal process.

9. The Secretary-General's alleged primary responsibility and definitive authority are irrelevant in this respect in relation to the question put to the Court by ECOSOC. I find it difficult to see why the Court is so very much concerned with the authority purported to be vested in the United Nations Secretary-General. The Court states in paragraph 49 that:

> "[ECOSOC] wishes to be informed of the Court's opinion as to whether . . . the Secretary-General's finding that the Special Rapporteur acted in the course of the performance of his mission is correct";

in paragraph 50, that:

> "[t]he Secretary-General, as the chief administrative officer of the Organization, has the authority and the responsibility to exercise the necessary protection where required";

in paragraph 51, that:

> "the Secretary-General has the primary responsibility and authority to protect the interests of the Organization and its agents, including experts on mission";

in paragraph 52, that:

> "the Secretary-General . . . has on numerous occasions informed the Government of Malaysia of his finding";

and, in paragraph 56, that:

"the Court is of the opinion that the Secretary-General correctly found [in this matter]".

10. I do not contest the substance of what the Court thus stated in its Advisory Opinion in connection with the authority of the Secretary-General. However, it is not for the Secretary-General *but for the Court* to exercise the authority vested in it to make a determination, at the request of ECOSOC, on the applicability of the Convention, and on Mr. Cumaraswamy's entitlement to immunity.

**4. Mr. Cumaraswamy's legal immunity — difference between the United Nations and Malaysia on the interpretation and application of the Convention**

11. The statement in paragraph (1) *(a)* of the operative part of the Advisory Opinion that "[the Convention] is applicable in the case of [Mr.] Cumaraswamy as Special Rapporteur of the Commission on Human Rights" is self-evident, since Mr. Cumaraswamy was duly appointed as a "Special Rapporteur" of the Commission, and "experts" under that Convention are interpreted to include "special rapporteurs" appointed by the United Nations.

12. The essential question concerns whether Mr. Cumaraswamy is entitled to "immunity from legal process of every kind" (Convention, Art. VI, Sec. 22 *(b)*) in spite of his "[comments] on certain litigations that had been carried out in Malaysian courts", comments which allegedly contained defamatory words and published in an article in the November 1995 issue of *International Commercial Litigation*. The Convention provides that:

> "[e]xperts . . . performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions . . . In particular they shall be accorded:
>
> . . . . . .
>
> *(b)* in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind." (Art. VI, Sec. 22 *(b)*.)

13. The issue on which the Court is bound to reply is whether the words allegedly spoken by Mr. Cumaraswamy in the interview published in the November 1995 issue of *International Commercial Litigation* do or do not fall within the meaning of "words spoken . . . in the course of the performance of [his] mission". The Court answers this question in paragraph (1) *(b)* of the operative part in the affirmative, stating that:

> "[Mr.] Cumaraswamy is entitled to immunity from legal process of every kind for the words spoken by him during an interview as published in an article in the November 1995 issue of *International Commercial Litigation*".

14. What is really at issue in the present case is *not the content of the words* themselves which Mr. Cumaraswamy was alleged to have uttered during the course of his interview as published in the journal *International Commercial Litigation*. The Court properly states in

paragraph 56 that "[t]he Court is not called upon in the present case to pass upon the aptness of the terms used by the Special Rapporteur or his assessment of the situation". What the Court should have discussed in the present case is whether Mr. Cumaraswamy spoke the words *in the course of the performance of his mission* as Special Rapporteur of the United Nations Commission and was therefore entitled to legal immunity granted under the Convention in connection with those words.

15. The words "in the course of the performance of [the] mission", or some similar expression, have often been utilized in the various instruments relating to diplomatic privileges and immunities, and also to the privileges and immunities for the armed forces stationed in foreign countries in pursuance of bilateral agreements. The interpretation of these expressions varies according to each case. No rule appears to have been firmly established in the doctrine or practice of international law in this respect. It might be considered debatable whether Mr. Cumaraswamy's agreeing to give an interview for a business journal is within "the course of the performance of [his] mission" as a special rapporteur and is therefore within the scope of the immunity granted under the Convention. However, it is in fact standard practice for special rapporteurs of the United Nations commissions to have contact with the media on the subjects essentially connected with the mandates given to them by the United Nations. Mr. Cumaraswamy's mandate consists of the following task:

> "*(a)* to inquire into any substantial allegations transmitted to him . . .;
>
> *(b)* to identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence . . .;
>
> *(c)* to study . . . important topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers." (Advisory Opinion, para. 44.)

It seems clear to me that what Mr. Cumaraswamy said in his interview with the journal did in truth constitute words spoken "in the course of the performance of [his] mission".

16. The following fact may also be pertinent in this respect. Previous to the interview by the journal published in its November 1995 issue, Mr. Cumaraswamy, apparently acting in his capacity as Special Rapporteur of the Commission on Human Rights issued, on 23 August 1995, a press statement reading in part:

> "Complaints are rife that certain highly placed personalities in Malaysia including those in business and corporate sectors are manipulating the Malaysian system of justice and thereby undermining the due administration of independent and impartial justice by the courts."

Several days later, on 29 August 1995, Mr. Cumaraswamy set out his concerns about the Malaysian judicial system in a letter to the Chairman of the Commission on Human Rights. Mr. Cumaraswamy's press statement was later referred to in his second report submitted on 1 March 1996 to the Commission on Human Rights. Mr. Cumaraswamy is quoted in the November 1995 issue of *International Commercial Litigation* as stating that:

> "Complaints are rife that certain highly placed personalities in the business and corporate sectors are able to manipulate the Malaysian system of justice"

— words quite similar to those he had previously used in his capacity as Special Rapporteur in his press statement of 23 August 1995, as referred to above. Thus, while the commercial companies in Malaysia claimed that they were bringing defamation suits against Mr. Cumaraswamy on account of words spoken during the interview with *International Commercial Litigation*, he had in fact already, some three months earlier, made an almost identical statement to the press at his own initiative in his capacity as Special Rapporteur.

17. In sum, I totally agree with the Court when it states in paragraph (1) *(b)* of the operative part, which I reiterate here, that:

> "[Mr.] Cumaraswamy is entitled to immunity from legal process of every kind for the words spoken by him during an interview as published in an article in the November 1995 issue of *International Commercial Litigation*".

5. **Exemption from taxed costs**

18. Paragraph (3) of the operative part: "[Mr.] Cumaraswamy shall be held financially harmless for any costs imposed upon him by the Malaysian courts, in particular taxed costs", is included in the Advisory Opinion because the Court was informed by means of the *Addendum to the Secretary-General's Note* (E/1998/94/Add. 1) that Mr. Cumaraswamy had been served with a Notice of Taxation and Bill of Costs dated 28 July 1998. As suggested in paragraph 6 above, paragraph (3) of the operative part is made in response to ECOSOC's *first question*.

19. In spite of my full agreement with what the Court stated in this respect, I believe that this paragraph need not have been specifically included in the operative part of the Advisory Opinion, once the first question put forward by ECOSOC had been answered in the affirmative, since the matter of "costs imposed upon [Mr. Cumaraswamy] by the Malaysian courts, in particular taxed costs", is certainly one included in immunity from legal process. If a person is immune from legal process before the national courts, he must also be entitled to immunity from any costs imposed upon him, as the Court correctly states in paragraph 64 of the Advisory Opinion:

> "the immunity . . . to which the Court finds Mr. Cumaraswamy entitled entails holding Mr. Cumaraswamy financially harmless for any costs imposed upon him by the Malaysian courts, in particular taxed costs."

In this respect, paragraph (3) simply states the obvious and, if this matter is to be mentioned in the operative part of the Advisory Opinion, then it should have been stated immediately after paragraphs (1) *(a)* and (1) *(b)* rather than after paragraphs (2) *(a)* and (2) *(b)*, which deal with the legal obligations of Malaysia.

6. **Decision on immunity by the Malaysian courts *in limine litis***

20. I agree entirely with the Court in its finding in paragraph (2) *(b)* of the operative part that the Malaysian national courts should have decided the issue of immunity at the outset:

> "the Malaysian courts had the obligation to deal with the question of immunity from legal process as a preliminary issue to be expeditiously decided *in limine litis*".

Assuming that Mr. Cumaraswamy was entitled to immunity under the Convention, at which stage did Malaysia begin to fail to ensure that immunity? When did the responsibility of Malaysia as a State in this respect begin? Certain Malaysian commercial companies initiated defamation suits against Mr. Cumaraswamy before the Malaysian national courts. The matter of whether the Malaysian courts should have dismissed the suits before issuing Mr. Cumaraswamy with the Order of Summons on 12 December 1996, or after having heard his views in writing or in his presence at the formal proceedings, is a matter relating to diplomatic privileges and immunities and constitutes a controversial issue — and, in fact, the practice and jurisprudence of States in this respect varies.

21. In fact, the national courts of any State cannot reach a decision concerning the immunity of a special rapporteur until they are aware of his or her status as a person entitled to claim legal immunity. The writ of summons issued by the Malaysian national courts may well have been justifiably issued against Mr. Cumaraswamy. However, upon being informed of the mission entrusted to Mr. Cumaraswamy by the United Nations — whether directly by Mr. Cumaraswamy himself upon his being summoned to appear before the relevant court, or by the Malaysian Foreign Office, or even by receiving directly a note or certificate issued by the United Nations Secretary-General — the Malaysian national courts should at that point have determined the preliminary issue, namely, whether Mr. Cumaraswamy was immune in respect of words spoken by him in the course of an interview with a business journal.

22. The Malaysian High Court of Kuala Lumpur failed to rule on this matter and instead, on 28 June 1997, ordered the Special Rapporteur to join his plea for immunity to his defence on the merits. Mr. Cumaraswamy could have claimed — and actually did claim, with the support of the certificate issued by the Secretary-General — his privileges and immunities before the Malaysian domestic courts. In this particular case, the Malaysian domestic courts should, at the jurisdictional phase, have then disposed *in limine litis* of the suits brought by the Malaysian commercial firms against Mr. Cumaraswamy.

7. **Legal obligation of Malaysia**

23. *(In general)* I would have some doubts as to whether paragraph (2) *(a)* and paragraph (4) of the operative part really answer the *second question* put by ECOSOC, namely,

> "[ECOSOC] . . . [r]equests . . . an advisory opinion from the International Court of Justice . . . on the legal obligations of Malaysia in this case".

Putting aside the issue of whether ECOSOC's *second question* was itself adequately formulated by that organization, the Court's answer to the *second question* should be simply that Malaysia is legally obliged to ensure that Mr. Cumaraswamy, Special Rapporteur of the Commission on Human Rights, enjoys in this case the immunities granted under Article VI, Section 22, of the Convention.

24. *(Paragraph (2)* (a) *of the operative part)* The Malaysian national courts decided to examine Mr. Cumaraswamy's plea in the merits phase of the proceedings against him. Malaysia, as a State, is responsible for the actions of its national courts in allowing the proceedings against Mr. Cumaraswamy to be pursued, rather than dismissing them. In other words, it is Malaysia, as a State, that is responsible for the failure of its organs — the judicial power in this case — to ensure Mr. Cumaraswamy's legal immunity. The matter of whether or not an executive department of the Malaysian Government informed its courts of the position taken by the Secretary-General is not a relevant issue in this case. I cannot agree with the conclusion reached by the Court in paragraph 62 of its Advisory Opinion that:

> "the *Government* of Malaysia had an obligation, under Article 105 of the Charter and under the [Convention], to inform its courts of the position taken by the Secretary-General". (Emphasis added.)

Thus, I do not support what the Court has stated in paragraph (2) *(a)* of the operative part:

> "the Government of Malaysia had the obligation to inform the Malaysian courts of the finding of the Secretary-General that [Mr.] Cumaraswamy was entitled to immunity from legal process".

25. *(Paragraph (4) of the operative part)* The Malaysian Government is obliged by Article VIII, Section 30, of the Convention to accept this Advisory Opinion *as decisive* and it is therefore not necessary for the Court to make any explicit statement such as that in paragraph (4):

> "the Government of Malaysia has the obligation to communicate this advisory opinion to the Malaysian courts, in order that Malaysia's international obligations be given effect and [Mr.] Cumaraswamy's immunity be respected".

Paragraph (4) is superfluous. It would be desirable that the views of the International Court of Justice should be communicated to the relevant Malaysian courts through the channel of the Foreign Office, but I do not agree that the Government of Malaysia is *obliged* to do so.

26. *(Summary)* I thus voted against paragraph (2) *(a)* and against paragraph (4) of the operative part for the reasons stated above. In responding to the *second question* concerning the matter of Malaysia's legal obligations, the Court should, instead of making unnecessary statements concerning the responsibility to be borne by the United Nations for any damage arising from acts

performed by the United Nations or by its agents acting in their official capacity, or concerning the scope of the agents' functions which they "must take care not to exceed" (Advisory Opinion, para. 66), have indicated whether the Government of Malaysia should make reparation to the United Nations as well as to Mr. Cumaraswamy for its non-compliance with the responsibility which it has to bear and how that reparation for the damages caused to the United Nations and/or to its Special Rapporteur, Mr. Cumaraswamy (if any is due), should be effected.

*(Signed)* Shigeru ODA.

## SEPARATE OPINION OF JUDGE REZEK

*[Translation]*

*The obligation incumbent upon Malaysia is not merely to notify the Malaysian courts of the finding of the Secretary-General, but to* ensure that the immunity is respected — *A government will ensure respect for immunity if it uses all the means at its disposal in relation to the judiciary in order to have that immunity applied, in exactly the same way as it defends its own interests and positions before the courts — Membership of an international organization requires that every State, in its relations with the organization and its agents, display an attitude at least as constructive as that which characterizes diplomatic relations.*

Having established the exact scope of the request for advisory opinion (paras. 34-39), the Court examined the facts in the light of the applicable law and concluded that the Special Rapporteur is entitled to immunity from legal process of every kind before national courts. The Secretary-General was therefore correct in ruling as he did. It accordingly served no purpose for the Court to go into the question of whether or not the Secretary-General's power of determination was exclusive and to decide how the State in question should proceed in the event that it contested the Secretary-General's determination.

I share the views of the majority on these points, but I would wish to emphasize that the obligation incumbent upon Malaysia is not merely to notify the Malaysian courts of the finding of the Secretary-General, but to *ensure that the immunity is respected*.

This is in no way to suggest a course of conduct incompatible with the very notion of the independence of the judiciary (which independence, moreover, constitutes the subject-matter of the Special Rapporteur's mission). The Government will ensure respect for immunity if, having endorsed the finding of the Secretary-General, it uses all the means at its disposal in relation to the judiciary (action by the public prosecutor or the advocate-general in the majority of countries) in order to have that immunity applied, in exactly the same way as it defends its own interests and positions before the courts. Admittedly, where the judiciary is an independent power, it is always possible that, notwithstanding the Government's efforts, immunity may finally be denied by the highest judicial instance. In that hypothetical case, just as in the concrete one of the refusal by the Malaysian courts to deal with the question of immunity *in limine litis*, Malaysia would incur international responsibility vis-à-vis the United Nations by reason of the acts of a power other than the executive. That would not be a situation unknown to international law, or indeed a rare occurrence in the history of international relations.

There is no obligation on sovereign States to found international organizations, or to remain Members of them against their will. However, the fact of membership — even in the case of an organization whose objectives are less essential than those of the United Nations, and in fields less salient than that of human rights — requires that every State, in its relations with the Organization and its agents, display an attitude at least as constructive as that which characterizes diplomatic relations between States.

*(Signed)* Francisco REZEK.

## DISSENTING OPINION OF JUDGE KOROMA

*Reasons for dissenting opinion -- Unable to justify Advisory Opinion on the face of the Convention, general principles of justice and peculiar circumstances of this case — Dispute not about human rights of Special Rapporteur or whether Government of Malaysia is in breach of its obligations under Human Rights Conventions to which it is a party — Dispute is about whether Special Rapporteur is immune from legal process for words spoken in performance of his mandate and Malaysia's obligations — Circumstances of the case — Interview given to* International Commercial Litigation *— Defamation lawsuits — Finding by Secretary-General that Special Rapporteur immune from legal process — Differences between Organization and Government of Malaysia — Matter referred to Economic and Social Council (ECOSOC) by Secretary-General — ECOSOC's formulation of question — ECOSOC entitled to formulate question but real question must be answered by Court — Court should have exercised discretion and declined to answer question because of its role as a judicial organ — For Court to determine applicability of Convention necessary to enquire into the merits — Insufficient for Court to rely on finding of another organ — Court's statement that United Nations experts must take care not to exceed scope of their mandate not without particular import and significance in this case — Obligation of Malaysia one of result and not of means — Convention does not stipulate particular method of implementation — Even in exercising advisory function, Court should not depart from essential rules guiding its activity as a judicial organ.*

1. Much as I would have liked to vote in favour of the Advisory Opinion, as it might assist in settling the differences which had arisen between the United Nations and the Government of Malaysia with regard to the interpretation and application of the General Convention on the Privileges and Immunities of the United Nations (hereinafter "the Convention"), however, in view of the fact that the Opinion is to be regarded as an authoritative legal pronouncement by the Court on the Convention, and is to be accepted as decisive by the Parties, and in view of the peculiar circumstances surrounding the dispute, I find myself unable to support and justify the Opinion, by reason of the terms of the Convention, the general principles of justice, the peculiarities of the dispute and my own legal conscience. I have therefore been constrained to vote largely against the Opinion and my views for doing so are set out in this opinion.

2. At the outset it should be noted that this dispute is not about the human rights of Mr. Cumaraswamy, Special Rapporteur of the Human Rights Commission, as such. Nor is it about whether Malaysia is in breach of its obligations under the Human Rights Conventions to which it is a party. The dispute is about whether Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations is applicable to Mr. Cumaraswamy — that is to say, whether words spoken or written by him were done so in his capacity as Special Rapporteur and *in the course of the performance of his mission* — and about the legal obligations of Malaysia.

3. The circumstances of this case are unusual. According to the material presented to the Court, Mr. Cumaraswamy, in an interview published in the 5 November 1995 issue of the magazine *International Commercial Litigation*, and in which he was referred to as Special Rapporteur on the independence of judges and lawyers, was reported to have said with reference to a specific case (the *Ayer Molek* case), that it looked like "a very obvious, perhaps even glaring example of judge-choosing", while stressing that he had not finished his investigation. Mr. Cumaraswamy was

also quoted as having said: "Complaints are rife that certain highly placed personalities in the business and corporate sectors are able to manipulate the Malaysian system of justice". He added: "But I do not want any of the people involved to think I have made up my mind." He was further reported to have said: "It would be unfair to name any names, but there is some concern about this among foreign businessmen based in Malaysia, particularly those who have litigation pending."

4. As a result of that interview a number of lawsuits were filed against Mr. Cumaraswamy by companies and individuals asserting that the published article contained defamatory words that had "brought them into public scandal, odium and contempt", and sued for damages including exemplary damages for slander.

5. The Legal Counsel of the United Nations acting on behalf of the Secretary-General of the United Nations, and later the Secretary-General himself, having considered the circumstances of the interview and the controverted passages of the interview, determined that Mr. Cumaraswamy was interviewed in his official capacity as Special Rapporteur and requested the Malaysian authorities to promptly advise the Malaysian courts of the Special Rapporteur's immunity from legal process with respect to the lawsuits.

6. On 12 March 1997 the Minister for Foreign Affairs of Malaysia filed a certificate with the trial court in which that court was invited to determine at its own discretion whether immunity applied, the certificate having stated that this was the case "only in respect of words spoken or written and acts done by him in the course of the performance of his mission".

7. On 28 June 1997 the Judge of the Malaysian High Court concluded that she was "unable to hold that the Defendant is absolutely protected by the immunity he claims", in part because she considered that the Secretary-General's note was merely "an opinion" with scant probative value and no binding force upon the court and that the Minister for Foreign Affairs' certificate "would appear to be no more than a bland statement as to a state of fact pertaining to the Defendant's status and mandate as a Special Rapporteur and appears to have room for interpretation". The Malaysian court ordered that the Special Rapporteur's motion be dismissed with costs; that the costs be taxed and paid forthwith by him and that he file and serve his defence within 14 days. On 8 July the Court of Appeal of Malaysia dismissed Mr. Cumaraswamy's motion for a stay of execution.

8. After efforts to resolve the dispute did not materialize in a negotiated settlement, the Secretary-General's Special Envoy advised that the matter should be referred to the Economic and Social Council (ECOSOC) to request an advisory opinion form the International Court of Justice. The Government of Malaysia acknowledged the Organization's right to refer the matter to the Council to request an advisory opinion in accordance with Section 30 of the Convention, advised the Secretary-General's Special Envoy that the United Nations should proceed to do so, and indicated that, while it would make its own presentation to the International Court of Justice, it did not oppose the submission of the matter to the Court through the Council.

9. The note by the Secretary-General (E/1998/94), referring the matter to the Council, concluded with a paragraph 21 containing a proposal for two questions to be submitted to the Court for an advisory opinion:

"21. . . .

'Considering the difference that has arisen between the United Nations and the Government of Malaysia with respect to the immunity from legal process of Mr. Dato' Param Cumaraswamy, the United Nations Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers, in respect of certain words spoken by him:

1. Subject only to Section 30 of the Convention on the Privileges and Immunities of the United Nations, does the Secretary-General of the United Nations have the exclusive authority to determine whether words were spoken in the course of the performance of a mission for the United Nations within the meaning of Section 22 *(b)* of the Convention?

2. In accordance with Section 34 of the Convention, once the Secretary-General has determined that such words were spoken in the course of the performance of a mission and has decided to maintain, or not to waive, the immunity from legal process, does the Government of a Member State party to the Convention have an obligation to give effect to that immunity in its national courts and, if failing to do so, to assume responsibility for, and any costs, expenses and damages arising from, any legal proceedings brought in respect of such words?

. . . . . ."

10. Section 30 of the Convention provides:

"*Section 30:* All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties."

11. After considering the note by the Secretary-General, ECOSOC, without any explanation, changed the question, as it was entitled to do, and requested the Court to render an advisory opinion

> "on the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General, and on the legal obligations of Malaysia in this case".

Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations provides that

> "*Section 22. Experts* (other than officials coming within the scope of Article V) performing missions for the United Nations *shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions* during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded:
>
> . . . . . .
>
> *(b) in respect of words spoken or written and acts done by them in the course of the performance of their mission*, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations." (Emphasis added.)

In other words, the Convention would be applicable to an expert in respect of words spoken or written and acts done by him in the course of the performance of his mission.

12. The Court in its Advisory Opinion reached the conclusion that Article VI, Section 22, of the Convention is applicable in the case of Mr. Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers, and that Mr. Cumaraswamy is entitled to immunity from legal process of any kind for the words spoken by him during an interview as published in an article in the November 1995 issue of *International Commercial Litigation*.

13. In my respectful opinion, for the Court to conclude that the Convention is applicable to Mr. Cumaraswamy *in this case*, that question is intrinsically and inextricably related to a finding whether the controverted words were spoken in the course of the performance of his mission. Furthermore, it would be inappropriate to reach such a conclusion by applying only the first part of the provision. It would also be injudicious as well as insufficient for the Court in making such a determination to rely on the findings of some other organ or institution to reach its conclusion, as the Court would appear to have done in this case. The references (see paragraphs 50 and 51 of the Opinion) to the authority and responsibility of the Secretary-General as chief administrative officer of the Organization and protector of the mission with which an expert is entrusted are, while incontestable, irrelevant to the question posed by ECOSOC. Indeed, the Court itself has stated that it is the Council's question as formulated which is to be answered by the Court. It cannot therefore be both ways. Nor, in my view, is it necessarily conclusive that

> "In the present case, the Secretary-General, or the Legal Counsel of the United Nations on his behalf, has on numerous occasions informed the Government of Malaysia of his finding that Mr. Cumaraswamy had spoken the words quoted in the article in *International Commercial Litigation* in his capacity as Special Rapporteur of the Commission and that he consequently was entitled to immunity from 'every kind' of legal process."

While such information is to be given due weight and respect, the Convention does not stipulate that it is conclusive, let alone binding. Nor should it be considered adequate in order for the Convention to be applicable, or for the judicial purposes of this case, that it has become standard practice for Special Rapporteurs of the Commission to have contact with the media. It is one thing to have contact with the media to enable a Special Rapporteur to carry out his mandate, but, as the Court implied in paragraph 66 of the Advisory Opinion, special rapporteurs, like all agents of the United Nations, must take care not to exceed the scope of their functions, and must express themselves with requisite prudence so as to remain within their mandate.

14. The question whether the Convention is applicable to Mr. Cumaraswamy is one of mixed law and fact, and would have required the Court not only to undertake an interpretation of the Convention but an enquiry into the facts before arriving at its conclusion. It therefore does not seem sufficient *for this case* for the Court to conclude that the Convention is applicable to Mr. Cumaraswamy based on the formality of his appointment as Special Rapporteur of the Human Rights Commission, or on the fact that he may have been entrusted not only to do research but also with the task of monitoring human rights violations and reporting on them. With respect, a special rapporteur, notwithstanding his appointment or the fact that he has been entrusted with a mission by the United Nations does not of itself allow him to operate outside his mandate, and whether or not the Special Rapporteur was acting within the scope of his mandate, given the facts and circumstances of this case, ought to have been enquired into for the Court to be in a position to conclude that the Convention is applicable to him. It is also my considered view that this requirement is not vitiated or become superfluous by the fact that it has become standard practice for special rapporteurs of the Human Rights Commission to have contact with the media. Having contact with the media cannot be regarded as a licence for a special rapporteur to operate outside his mandate; whether or not the Special Rapporteur did so or not in this particular case and for the purposes of the Convention is a matter to be determined by the Court before it can conclude that the Convention is applicable.

15. It is also my considered opinion that this request for an advisory opinion, because of the peculiar circumstances[1] of the dispute, the issues it involves, and its implication for the judicial character and function of the Court, ought not to have been submitted to the Court. The dispute between the Organization and the Government of Malaysia should rather have been resolved on the basis of Article VIII — Settlement of Disputes — (Section 29) of the Convention which provides as follows

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[1]See *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, p. 61.

"*Section 29.* The United Nations shall make provisions for appropriate modes of settlement of:

*(a)* disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party."

On the other hand, once the request had been submitted, the Court should have exercised its judicial discretion and declined to answer the question put to it. Nor do I find the argument persuasive that, because no party had argued against giving the advisory opinion, the Court should therefore have rendered an opinion. For the Court itself has emphasized that it is the guardian of its role as a judicial organ and has made it clear that, although it considers the rendering of an advisory opinion as a duty, at the same time, as a judicial organ, it has certain limits to its duty to reply to a request for an opinion[2]. The Court should not have felt constrained to exercise its discretion of not answering the question as formulated because of the Advisory Opinion it had earlier rendered in the *Mazilu* case[3]. In my view, not only is the instant case not identical with *Mazilu*, but the circumstances are entirely different. Had due account been taken of those differences as well as of the peculiar circumstances, a different conclusion might have been reached.

16. Furthermore, and as noted earlier, the note of the Secretary-General referring this matter to ECOSOC concluded with a paragraph 21 in which he proposed two questions to be submitted to the Court for an advisory opinion.

17. The Council, after considering the note at the forty-seventh and forty-eighth meetings of its substantive session held on 31 July 1998 and pursuant to Article 96, paragraph 2, of the Charter of the United Nations and in accordance with General Assembly resolution 89 (I) authorizing the Council to request an advisory opinion from the Court, adopted decision 1998/297, in which it requested the Court to give an opinion, on a priority basis, on

"the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General, and on the legal obligations of Malaysia in this case".

18. As indicated in paragraph 33 of the Advisory Opinion, following submission of the request to the Court, the Legal Counsel of the United Nations presented a written statement on behalf of the Secretary-General, in which he requested the Court:

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[2] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, I.C.J. Reports 1950*, p. 71.

[3] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 177.

"to establish that, subject to Article VIII, Sections 29 and 30 of the Convention, the Secretary-General has exclusive authority to determine whether or not words or acts are spoken, written or done in the course of the performance of a mission for the United Nations and whether such words or acts fall within the scope of the mandate entrusted to a United Nations expert on mission".

19. Similarly, States participating in the proceedings expressed varying views as to whether the General Convention requires dispositive legal effect to be given to the Secretary-General's determination. According to the United States, *"the views of the Secretary-General in a given case are highly relevant"* (emphasis added); the United Kingdom takes the position that it is *"essential that all due weight is given to [the views of the Secretary-General] by the national courts"* (emphasis added). Italy had expressed the following viewpoint on the issue:

"once . . . a decision has been adopted, both the government and the judicial authorities of the State where the issue of immunity has been raised are nonetheless obliged to give immediate and careful consideration to the delicate problems of immunity, and they must take due account of the weight to be accorded to the determination made in this regard by the Secretary-General of the United Nations.

*It would be going too far to say that this imposes a legal duty on the courts of the State where the issue of immunity has been raised to stay all proceedings until the issue of immunity has been settled at the international level.* But, at the very least, it is to be expected that those courts would display caution by avoiding hasty decisions which might entail responsibility on the part of that State." (Emphasis added.)

20. Malaysia, for its part, as stated in the Advisory Opinion, contended that the advisory opinion of the Court should be restricted to the existing difference between the United Nations and Malaysia, which in its view consists of the question, as formulated by the Secretary-General himself, whether the Secretary-General of the United Nations has the exclusive authority to determine whether words or acts of an expert on mission are spoken, written or done in the course of the performance of his or her mission and if, in consequence, the expert is entitled to immunity from legal process pursuant to Section 22 *(b)* of the General Convention. In its written statement Malaysia maintains that it

"considers that the Secretary-General of the United Nations has not been vested with the exclusive authority to determine whether words were spoken in the course of the performance of a mission for the United Nations within the meaning of Section 22 *(b)* of the Convention".

In its oral pleadings, Malaysia maintained that

"in implementing Section 30, ECOSOC is merely a vehicle for placing a difference between the Secretary-General and Malaysia before the Court. *ECOSOC does not have an independent position to assert as it might have had were it seeking an opinion on some legal question other than in the context in the operation of Article 30.* ECOSOC . . . is no more than an instrument of reference, it cannot change the nature of the difference or alter the content of the question." (Emphasis added.)

21. In the light of the foregoing, it is to be observed that the question asked by ECOSOC corresponds neither with the questions proposed by the Secretary-General in his note to ECOSOC nor with those same issues as were raised and discussed by the participating States in their written statements or at the oral proceedings. A difference exists between the legal question posed by ECOSOC relating to the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, and the one recommended by the Secretary-General and understood and addressed by Malaysia and a number of participating States, which concerns the issue of whether the Secretary-General of the United Nations is vested with exclusive authority to determine whether words were spoken in the course of the performance of a mission for the United Nations and whether such words fall within the meaning of Section 22 *(b)* of the Convention.

22. Where a request to the Court for an advisory opinion involving the interpretation and application of the Convention is in conformity with Article 65, paragraph 2, of the Statute of the Court, that is to say it contains an exact statement of the question upon which an opinion is required, and is also in conformity with Article 96 of the Charter, then it would appear, as in this case, formally to meet all the required criteria for the Court to perform its advisory function. However, notwithstanding the fulfilment of such procedural criteria, the Court has in the past taken the position that, while it is in principle under a duty to give an answer to a request, it need not give the opinion requested. In other words, the Court will answer the real question as it sees it, even though it is bound by the request[4]. Accordingly, the Court has stated that, in answering a question, it must have full liberty to consider all the relevant data and circumstances available to enable it to form an opinion on the question submitted to it for an advisory opinion.

23. As pointed out above, in this instant matter not only is the question posed by ECOSOC not identical with that which had been proposed to it by the Secretary-General of the United Nations for submission to the Court, and which had constituted the difference between the Secretary-General and Malaysia and was also the question which the majority of the States that participated in the proceedings had addressed, but there is in fact no dispute between Malaysia and the United Nations whether the Convention applies to the Special Rapporteur as such, which as we have seen is not the real question.

24. Accordingly, either the dispute should have been properly presented to the Court or the Court's judicial character should have been observed. While it is for ECOSOC to formulate the question to be submitted to the Court for an advisory opinion, the Court is, however, not obliged to answer such a question, if it would have a negative implication for its judicial character and function. The Court is enjoined by its Statute to observe the principles of judicial integrity, even in exercising its advisory jurisdiction, and not to lose sight of its judicial character. Its role as a judicial organ would come under a cloud, not to say be impaired, where a question submitted to it was formulated in such a way as to appear tendentious or ambiguous or have as its underlying purpose to support or promote a particular point of view, or merely to obtain a judicial affirmation

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[4] *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928, P.C.I.J., Series B, No. 16; Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First/Second Phase, Advisory Opinion, I.C.J. Reports 1950,*

of that viewpoint. If a question submitted to the Court were to appear to suffer from any of these defects, I consider it the Court's duty and an exercise of the judicial function as well as in the interest of justice that it should decline to answer the question as submitted and not give a judgment which cannot be obtained by the proper procedure. In other words, where it would appear that the object of a request to the Court is simply to obtain a formal endorsement of the requesting party's position, the Court, as a judicial body, should decline to answer the question. The Court cannot dissociate itself from the effect to which its decision is going to be put. This is all the more so in the instant case, whose specific facts and circumstances are so very different from the *Mazilu* case, where the Court had held that

> "Section 22 of the General Convention is applicable to persons (other than United Nations officials) to whom a mission has been entrusted by the Organization and who are therefore entitled to enjoy the privileges and immunities provided for in this Section with a view *to the independent exercise of their functions*"[5] (emphasis added).

25. It is also worth recalling that, under Section 30 of the Convention, the advisory opinion given in this case is to be regarded as decisive and binding and would have effect for the State concerned. Indeed, in paragraph 39 of the Advisory Opinion the Court stated that the request of the Council does not only pertain to the threshold question but also to the consequences of the answer thereto. In my view, for a judicial determination of the consequences to be reached, the Court would have to enter into the merits of the dispute, as the question whether words spoken were done in performance of a mission is one of mixed law and fact. The Court, in determining whether words spoken by the Special Rapporteur were spoken in the performance of his mission and whether he is therefore entitled to immunity, must do so in the light of all the circumstances of the case.

26. The question whether, in this case, the Convention is applicable to Mr. Cumaraswamy and the obligations of Malaysia thereunder is not an abstract one. Nor did the question require clarification as in the *Peace Treaties* case. Viewed from this perspective, the Convention would be applicable to Mr. Cumaraswamy as Special Rapporteur of the Human Rights Commission and therefore an expert under the Convention, if the words spoken were *done in the performance of his mandate*. Malaysia, as a party to the Convention, would be under obligation to afford Mr. Cumaraswamy such immunities. The request asked to take into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General. What the Court had to determine was whether the Convention should be applicable to the Special Rapporteur and whether he should therefore be immune from legal process of every kind, in respect of words spoken in the performance of his mission, a matter, which in my view, is one for assessment by the Court.

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[5] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, pp. 195-196.

27. The Court's statement in paragraph 56 of the Advisory Opinion that it is not called upon in the present case to pass upon, to adjudge, the aptness of the terms used by a Special Rapporteur, or his assessment of the situation, but that in any event, and in view of all the circumstances of this case, it is of the opinion that the Secretary-General correctly found that Mr. Cumaraswamy, in speaking the words quoted in the article, was acting in the course of the performance of his mission as Special Rapporteur of the Commission is not without import and significance in terms of this case. The Court also found it necessary to warn that

> "It need hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations".

I fully concur with these statements of the Court.

28. I have voted against operative paragraph 2, as I consider it is not the proper response to the question posed to the Court. I also voted against that paragraph because Malaysia's obligation under the Convention is one of result and not one of method of implementation of the obligation. In this regard the Court stated in paragraph 60 of the Advisory Opinion that the Secretary-General has the authority to *request* (emphasis added) the government of a member State to bring his finding to the knowledge of the local courts if acts of an agent have given rise to court proceedings. In my view, whereas the Secretary-General is authorized to make such request, how a party implements its obligations under the Convention is a matter for that State. The Court was not asked to pass on the means or methods of implementation. Once the Court has responded that the Convention is applicable to the matter, Malaysia would assume its obligations, including making Mr. Cumaraswamy financially harmless for any taxed costs imposed upon him. To have included this as an operative paragraph was unnecessary. Nor does the Convention stipulate any particular method of implementation, or for that matter a uniform method of implementation. Therefore, to hold a State in breach of its obligation for not adopting a particular method or means of implementing or achieving the object appears to find no justification on the face of the Convention.

29. Finally, I share the Court's position as reflected in its jurisprudence that its response to a request for an advisory opinion should be seen as participation in the work of the Organization with a view to the achievement of its aims and objectives, and that only compelling reasons should restrain the Court from answering a request. I, however, consider it more important that this Court, as a judicial organ, cannot and should not, even in giving an advisory opinion, depart from the essential rules guiding its activity as a court[6].

*(Signed)* Abdul G. KOROMA

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[6] *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, p. 27.